United States Court of Appeals for the Second Circuit

APPENDIX

77-4115

BEFORE THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INTERCONEX, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
AND THE UNITED STATES OF
AMERICA,

Respondents.

Docket No. 77-4115

B

JOINT APPENDIX

P/s

October 17, 1977

UNITED STATES COURT OF APPEALS
FILED
OCT 17 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL

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OFFIC

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573

E OF THE SECRETARY

June 5, 1975

CERTIFIED

Interconex, Inc.
444 Madison Avenue
New York, New York 10022

Re: Docket No. 75-19

Gentlemen:

Enclosed is a copy of the above numbered complaint in which you have been named respondent.

Answer to the complaint is due to be filed with the Commission within twenty (20) days after the date of service stamped on the complaint, unless additional time is permitted under Rule 5(d) of the Commission's Rules of Practice and Procedure, 46 CFR sec. 502.64. See also Rules 1(b), 3(a), 3(b), 7(a), and 8, 46 CFR secs. 502.2, 502.41, 502.42, 502.101, and 502.111-502.118.

Very truly yours,

Francis C. Hurney
Francis C. Hurney
Secretary

Encl.

Docket No.

BEFORE THE FEDERAL
MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP,
on its own behalf and as agent
for the Government of the
Republic of Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND
SERVICE, INC., AMERICAN EXPORT
LINES, INC., and U.S.
LINES, INC.,

Respondents.

COMPLAINT

Paul, Weiss, Rifkind, Wharton & Garrison

Attorneys for Complainant

345 PARK AVENUE, NEW YORK, N. Y. 10022
644-8000

All communications should be referred
to Sidney S. Rosdeitcher, Esq.

BEFORE THE FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION
OFFICE OF THE SECRETARY

---x

COLT INDUSTRIES OPERATING CORP, on its own behalf and as agent for the Government of the Republic of Korea, :

Complainant, :

COMPLAINT

-against- :

Docket No. 75-1

INTERCONEX, INC., SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC., and U.S. LINES, INC., :

Respondents. :

SERVED
JUN 5 1975
FEDERAL MARITIME COMMISSION

---x

Complainant Colt Industries Operating Corp, by its attorneys Paul, Weiss, Rifkind, Wharton & Garrison and Haight, Gardner, Poor & Havens, alleges upon information and belief as follows:

1. Complainant Colt Industries Operating Corp, (hereinafter referred to as Colt Industries) is a corporation duly organized and existing pursuant to the laws of the State of Delaware. Its principal place of business is at 430 Park Avenue, New York, New York. Among other activities, Colt Industries is involved, through its Firearms Division (formerly Colt's Inc.), whose principal place of business is at 150 Huyshope Avenue, Hartford, Connecticut, in the manufacture of firearms and purchase of equip-

ment for the production of firearms, for export purposes as well as domestic consumption. At all times hereinafter alleged, complainant Colt Industries was and now is the duly authorized agent of the Government of the Republic of Korea, in the negotiation and performance of the transactions hereinafter alleged.

2. Respondent Interconex, Inc., whose principal office and place of business is 444 Madison Avenue, New York, New York, was at all pertinent times and now is an independent ocean freight forwarder and/or a nonvessel operating common carrier by water, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

3. Respondent Sea-Land Service, Inc., whose principal office and place of business is at Fleet Street, P.O. Box 2000, Elizabeth, New Jersey, was at all pertinent times and now is a common carrier by water engaged in transportation between, among other ports, ports in the United States and Korea, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

4. Respondent American Export Lines, Inc., whose principal office and place of business is at 17 Battery Place, New York, New York, was at all pertinent times and now is a common carrier by water engaged in transportation between, among other ports, ports in the United States and Korea, and as such is

subject to the provisions of the Shipping Act of 1916, as amended.

5. Respondent U.S. Lines, Inc., whose principal office and place of business is at 1 Broadway, New York, New York was at all pertinent times and now is a common carrier by water engaged in transportation between, among other ports, ports in the United States and Korea, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

6. On or about November 11, 1971, respondent Interconex Inc., as an independent ocean freight forwarder, entered into a contract with complainant Colt Industries to provide all necessary services for the movement of goods and merchandise from the United States and United States ports to ports in Korea. Said goods were purchased for and consigned to the Government of the Republic of Korea by complainant Colt Industries pursuant to a March 13, 1971 contract between those two parties. On or about July 26, 1972, and pursuant to a letter from respondent Interconex Inc. dated December 27, 1971, said respondent assumed towards complainant by amendment to the November 1971 contract the obligations of a nonvessel operating carrier by water, in accordance with the provisions of said respondent's tariff on file with this Commission.

7. Between the dates of on or about July 28, 1972 to and including February 5, 1975, respondent Interconex, Inc. arranged for the ocean carriage of numerous shipments of merchandise furnished by complainant Colt Industries and consigned to the Government of the Republic of Korea. Said ocean carriage was undertaken by a number of vessels, owned by respondents Sea-Land Service, Inc., American Export Lines, Inc., or U.S. Lines, Inc. The particulars of each such shipment, to the extent presently known to complainant, are set forth in Schedule A, attached to this complaint, and incorporated by reference herein. Complainant will furnish further particulars, in the form of amended schedules, as soon as it is in a position to do so.

8. In preparing ocean bills of lading under its contractual obligation for such shipments, respondent Interconex, Inc., either fraudulently, negligently or by reason of gross negligence and recklessness misstated the cubic measurements and/or calculation of weights of the shipments in question, as a consequence of which said respondent charged, demanded, collected and received from complainant compensation in excess of that provided for by the said respondent's published tariff, and in violation of Section 18 of the Shipping Act of 1916, 46 U.S.C. Section 817(b)(3). Such particulars of excessive compensation as are presently known to complainant are set forth in Schedule

A to this complaint. Complainant will furnish further particular in the form of amended schedules, as soon as it is in a position to do so.

9. By reason of the facts misstated by Interconex, Inc. alleged above, respondents Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc., as their several interests appear or shall appear from Schedule A attached hereto or subsequent supplements thereto, have received compensation for ocean carriage in excess of that provided for by the Far East Conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question, in violation of Section 18 of the Shipping Act of 1916, 46 U.S.C. Section 817(b)(3).

10. As a result of the facts alleged in this complaint, complainant and/or its principal, the Government of the Republic of Korea, has been damaged by reason of excessive charges for ocean freight, in a total amount presently estimated to be about $500,000. Complainant reserves the right to amend this complain to allege such further or different amounts as it may later be advised.

11. Complainant designates the City of New York, County of New York, State of New York, as the desired place for hearings in this proceeding.

WHEREFORE, complainant prays that respondent be required to answer the charges herein; and that after due hearing and investigation the Commission direct the payment to complainant by respondents, as their liabilities may appear, of full reparation for the unlawful charges hereinabove described, in such sums as the Commission may determine to be proper as an award of reparation; and that such other and further order or orders be made as the Commission determines to be proper in the premises.

Dated this 30th day of May , 1975

David C. Eaton

COLT INDUSTRIES OPERATING CORP
By David C. Eaton
President Firearms Division
150 Huyshope Avenue
Hartford, Connecticut

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
By Sidney S. Rosdeitcher, Esq.
A Member of the Firm
Attorneys for Complainant
345 Park Avenue
New York, New York 10022

Dwight Timbers

HAIGHT, GARDNER, POOR & HAVENS
By Charles Haight, Esq.
A Member of the Firm
Attorneys for Complainant
1 State Street Plaza
New York, New York

Verification

STATE OF Connecticut
COUNTY OF Hartford : ss.: Hartford

DAVID C. EATON, being duly sworn on oath deposes and says that he is President, Firearms Division, Colt Industries Operating Corp and is the person who signed the foregoing complaint; that he has read the complaint and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

David C. Eaton

Subscribed and sworn to before me, a notary public in and for the State of Connecticut, County of Hartford this [illegible]th day of May , A.D. 197[illegible].

My Commission expires My Commission Expires March 31, 1977.

SCHEDULE A

00069

010

1. **Carrier:** Sea Land

2. **Container Number:** SL 4244

3. **Seal Number:** # 1538 & 1539

4. **Name of Vessel:** ST. LOUIS

5. **Port of Loading:** NEW YORK

6. **Date Shipped from Loading Port:** FEB. 13, 1973

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 1

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** SEE REMARKS (Pg #2)

12. **Description of Commodity:** 26 Packages machinery & Parts

13. **Weight:** 19,342 lBS

14. **Measurement:** 1808

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

00199

011

1. Carrier: Sea-Land Inc.

2. Container Number: SL 102459

3. Seal Number: #12308

4. Name of Vessel: Resourse

5. Port of Loading: Long Beach

6. Date Shipped from Loading Port: Dec 26, 1973

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K56020, K56511

12. Description of Commodity: 15 Pallets - Granulated Fireclay

13. Weight: 44,180 lbs

14. Measurement: 2400

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:

MAJOR G[redacted]OO SAM SUK
COMMAN[redacted]ERAL
NATIO[redacted]SE ARSENAL
DONG RE[redacted].
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

012

1. Carrier: Sea-Land
2. Container Number: SEAU 10676
3. Seal Number: 1167 + 1168
4. Name of Vessel: Resource
5. Port of Loading: N.Y.
6. Date Shipped from Loading Port: 3-18-74
7. Port of Discharge: PUSAN, KOREA
8. Number/Date, Interconex B/L: 1
9. Number/Date, Ocean Carrier B/L:
10. Date Received at Discharge Point:
11. Purchase Order Number: See Remarks
12. Description of Commodity:
    18 Drums Lubricant Oil
    26 Boxes Steel Bars
    2 Boxes Machinery Parts
13. Weight: 44,401
14. Measurement: 1948 Cuft.
15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.
16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND INC.

2. Container Number: 66852

3. Seal Number: 1181 + 1182

4. Name of Vessel: Trade

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 4-4-74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55207, K55304, K55230, K55217, K56540
K55269. K55247, K55295, K55315

12. Description of Commodity: 11 Drums Petroleum Lube Oil
18 Boxes Steel Bars

13. Weight: 35,349

14. Measurement: 2050 cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

014

1. Carrier: SEA-LAND INC.

2. Container Number: SEAU 104097

3. Seal Number: 1197 + 1198

4. Name of Vessel: Finance 8

5. Port of Loading: New York

6. Date Shipped from Loading Port: April 22, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K 55272

12. Description of Commodity: 17 cases- Steel Bars

13. Weight: 43,000 lbs

14. Measurement: 1680

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND INC

2. Container Number: SEAU 43536

3. Seal Number: # 1199 + 1200

4. Name of Vessel: Resource

5. Port of Loading: New York

6. Date Shipped from Loading Port: 4/22/74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55272

12. Description of Commodity: 17 cases - steel Bars

13. Weight: 43,000 lbs

14. Measurement: 1680 cu.ft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND INC.

2. Container Number: 102139 016

3. Seal Number: 2105 + 2106

4. Name of Vessel: Resource

5. Port of Loading: New York

6. Date Shipped from Loading Port: 5/2/74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55328, K56678, K55258

12. Description of Commodity: 18 Drums. Petroleum Lube Oil
21 Cases. Steel Bars

13. Weight: 44,246 lbs

14. Measurement: 1938 cu ft

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

017

1. Carrier: SEA-LAND, INC.

2. Container Number: SEZU 100664

3. Seal Number: #2113 & 2114

4. Name of Vessel: Trade

5. Port of Loading: New York

6. Date Shipped from Loading Port: 5/15/74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L:

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K56914, K55235, K55234, K55233
K55236, K55238, K56540

12. Description of Commodity: 2 Drums - Petroleum Lube Oil
22 Drums - Iron Ingots

13. Weight: 43,270 lbs

14. Measurement: 1870 cu ft

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

018

1. Carrier: SEA-LAND, INC

2. Container Number: Seau 100290

3. Seal Number: 2117 + 2118

4. Name of Vessel: Galloway

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 5/28/74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: See Remarks (PG. #2)

12. Description of Commodity:
5 cases - machine Tooling
25 Drums - Cleaning Compound
23 cases - Steel Bars

13. Weight: 40,114 lbs

14. Measurement: 2218 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND INC

2. Container Number: Sealand 63793

3. Seal Number: #2115 & 2116

4. Name of Vessel: Galloway

5. Port of Loading: New York

6. Date Shipped from Loading Port: 5/28/74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55323, K57513, K55219, K55237, K55239 K56568.

12. Description of Commodity:
4 Drums Trichloroethane
1 case Machinery
28 cases Steel Bars.

13. Weight: 40,805 lbs

14. Measurement: 1942 cft

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

020

1. Carrier: SEA-LAND, INC.

2. Container Number: Sealand 61921

3. Seal Number: 2127, + 2128

4. Name of Vessel: Resource V7

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 6-1-74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55312, K55296, K55328

12. Description of Commodity: 17 CASES STEEL Bars

13. Weight: 44,315

14. Measurement: 2028 cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND, INC.
2. Container Number: SEAU 105597
3. Seal Number: —
4. Name of Vessel: commerce V18
5. Port of Loading: N.Y.
6. Date Shipped from Loading Port: June 14, 1974
7. Port of Discharge: PUSAN, KOREA
8. Number/Date, Interconex B/L: /
9. Number/Date, Ocean Carrier B/L:
10. Date Received at Discharge Point:
11. Purchase Order Number: K55272
12. Description of Commodity: 10 cases - Steel Bars
13. Weight: 41,560 lbs
14. Measurement: 1802 cuft
15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.
16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** SEA-LAND, INC.

2. **Container Number:** SEAU 105841

3. **Seal Number:** #2137 & 2138

4. **Name of Vessel:** Galloway

5. **Port of Loading:** New York

6. **Date Shipped from Loading Port:** June 24, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 1

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K56029

12. **Description of Commodity:** 5 - Cases - Machinery

13. **Weight:** 10,300 lbs

14. **Measurement:** 1968

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND, INC.

2. Container Number: Sealand 38559

3. Seal Number: # 2139 + 2140

4. Name of Vessel: Galloway

5. Port of Loading: New York

6. Date Shipped from Loading Port: June 24, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: See Remarks

12. Description of Commodity:
5 pkgs - Machine Tooling
1 Case - Machinery
20 Drums - Methylene Chloride
9 pkgs - Steel Bars

13. Weight: 37,758 lbs

14. Measurement: 1888

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEA-LAND, INC.

2. Container Number: Sealand 107600

3. Seal Number: # 2131 & 2132

4. Name of Vessel: Commerce V 18

5. Port of Loading: New York

6. Date Shipped from Loading Port: June 26, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: See Remarks (pg #2)

12. Description of Commodity:
1 case - machine Tooling
18 cases - Steel
2 cases - Chemicals N.O.I.

13. Weight: 42,788 lbs

14. Measurement: 2210

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: SEALAND - INC

2. Container Number: Sealand 46197 025

3. Seal Number: # 2129 & 2130

4. Name of Vessel: Commerce V18

5. Port of Loading: New York

6. Date Shipped from Loading Port: JUNE 26, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 3

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: See Remarks (pg #2)

12. Description of Commodity:
7 cases - Machine Tooling
9 cases - Chemicals N.O.I.
3 drums - Tumbling media
14 cases - Steel

13. Weight: 35,295 lbs

14. Measurement: 2146

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

00277

026

1. Carrier: SEA-LAND INC.

2. Container Number: SEA 36977

3. Seal Number: #2145 & 2146

4. Name of Vessel: Finance V10

5. Port of Loading: New York

6. Date Shipped from Loading Port: July 17, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K57986 & K55272

12. Description of Commodity: 1 case - Chromic Acid Flakes
14 Cases - Steel Bars

13. Weight: 40,526 lbs

14. Measurement: 2086

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

CC279

027

1. Carrier: Sea-Land Inc.
2. Container Number: SEAU 104763
3. Seal Number: 2147, 2148
4. Name of Vessel: COMMERCE V 19
5. Port of Loading: N.Y.
6. Date Shipped from Loading Port: 7-18-74
7. Port of Discharge: PUSAN, KOREA
8. Number/Date, Interconex B/L: 1
9. Number/Date, Ocean Carrier B/L:
10. Date Received at Discharge Point:
11. Purchase Order Number: K-57986, K-55272
12. Description of Commodity: 2 CASES CHROMIC ACID
14 CASES STEEL BARS
13. Weight: 38,596
14. Measurement: 2115 CU.FT.
15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.
16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

CC250

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 101949 028

3. **Seal Number:** #2149 + 2150

4. **Name of Vessel:** Commerce V19

5. **Port of Loading:** New York

6. **Date Shipped from Loading Port:** July 18, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 2

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K55272

12. **Description of Commodity:** 17 cases - Steel Bars

13. **Weight:** 42,568 lbs

14. **Measurement:** 2210

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

029

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 100926

3. **Seal Number:** #2151 + 2152

4. **Name of Vessel:** Galloway V 33

5. **Port of Loading:** New York

6. **Date Shipped from Loading Port:** August 1, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:**

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K55233, K55236, K55237, K55238 K57682

12. **Description of Commodity:** 26 Drums - Iron ingots

13. **Weight:** 43,776 lbs

14. **Measurement:** 2210 CFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land 030

2. Container Number: SEAU 100073

3. Seal Number: #2153 & 2154

4. Name of Vessel: EXCHANGE V24

5. Port of Loading: New York

6. Date Shipped from Loading Port: Aug 1, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: S.O. 31065

12. Description of Commodity: 12 Pallets - Aluminum Oxide
5 Drums - Iron Ingots
4 Cases - Steel Bars
1 Drum Hydrogen Peroxide
4 Cases Machine Tooling

13. Weight: 45,009 lbs

14. Measurement: 2025 CFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 101418

3. **Seal Number:** # 2161 + 2162

4. **Name of Vessel:** FINANCE V11

5. **Port of Loading:** New York

6. **Date Shipped from Loading Port:** August 1, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 1

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** See Remarks

12. **Description of Commodity:** 53 Drums - Petroleum Lube Oil
4 " - Iron Ingots
6 cases - Machine Tooling

13. **Weight:** 40,301 lbs

14. **Measurement:** 2015 CFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

00290

032

1. **Carrier:** Sea-land

2. **Container Number:** SEAU 74133

3. **Seal Number:** 2163 + 2164

4. **Name of Vessel:** FINANCE V 11

5. **Port of Loading:** N.Y.

6. **Date Shipped from Loading Port:** 8-1-74

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 2

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K-55263 - K-56911

12. **Description of Commodity:** 21 CASES STEEL BARS
1 CASE MACHINE TOOLING

13. **Weight:** 43,556

14. **Measurement:** 2240 cuft.

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 106885

3. **Seal Number:** —

4. **Name of Vessel:** EXCHANGE V 24

5. **Port of Loading:** NEW YORK

6. **Date Shipped from Loading Port:** Aug 1, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 2

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** S.O. 31077

12. **Description of Commodity:**
1 case - Petroleum Lube Oil
8 cases - Steel Bars
16 Drums - Cleaning Compound
5 cases - Machine Tooling

13. **Weight:** 41,672 lbs

14. **Measurement:** 2084 CUFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

034

1. Carrier: Sea-Land
2. Container Number: SEAU 103372
3. Seal Number: # 2157 & 2158
4. Name of Vessel: Exchange V 24
5. Port of Loading: New York
6. Date Shipped from Loading Port: Aug 1, 1974
7. Port of Discharge: PUSAN, KOREA
8. Number/Date, Interconex B/L: 3
9. Number/Date, Ocean Carrier B/L:
10. Date Received at Discharge Point:
11. Purchase Order Number: K 55296 + S.O. 33930
12. Description of Commodity: 21 Cases - Steel Bars
4 Cases - Machine Tooling
13. Weight: 44,356 lbs
14. Measurement: 2195 CFT
15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.
16. Consignee Under Ocean Carrier B/L:
    MAJOR GEN. YOO SAM SUK
    COMMANDING GENERAL
    NATIONAL DEFENSE ARSENAL
    DONG RE P.O.
    I.P.O. BOX 37, PUSAN, KOREA
17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 302152

3. Seal Number: 2165 2166

4. Name of Vessel: FINANCE V 11

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 8-9-74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 3

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K-55263 - K-55296

12. Description of Commodity: 21 CASES STEEL BARS

13. Weight: 43,448

14. Measurement: 2058 Cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 107137

3. Seal Number: 2169 & 2170

4. Name of Vessel: FINANCE VII

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 8-9-74.

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 4

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K-55296 K-58298

12. Description of Commodity: 17 CASES STEEL BARS
2 CASES NITRIC ACID CORROSIVE LABEL

13. Weight: 44,993

14. Measurement: 1913 Cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 62632

3. Seal Number: # 2173 + 2174

4. Name of Vessel: COMMERCE V20

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: Aug 20, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: S.O. 31099

12. Description of Commodity:
19 Cases - steel Bars
1 case - Machine Tooling
1 case - Chromate Acid

13. Weight: 43,009 lbs

14. Measurement: 2159 CFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEALAND 55248

3. Seal Number: 2177 + 2178

4. Name of Vessel: COMMERCE V20

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 8-20-74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 3

9. Number/Date, Ocean Carrier B/L: 3

10. Date Received at Discharge Point:

11. Purchase Order Number: K57110, K55288

12. Description of Commodity: 12 Pallets Aluminum Oxide Grit
32 Cases Steel Bars

13. Weight: 43,140

14. Measurement: 2073 cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

039

1. **Carrier:** Sea-Land

2. **Container Number:** Sealand 53432

3. **Seal Number:**

4. **Name of Vessel:** Galloway V 35

5. **Port of Loading:** N. Y.

6. **Date Shipped from Loading Port:** 9-7-74

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 1

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K-55296

12. **Description of Commodity:** 21 CASES - STEEL BARS

13. **Weight:** 42,840

14. **Measurement:** 2142 CU. FT.

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

040

1. Carrier: Sea-Land

2. Container Number: SEAU 70091

3. Seal Number:

4. Name of Vessel: GALLOWAY V 35

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 9-7-74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K-55296, K-55258, K-55317, K-55301

12. Description of Commodity: 20 CASES STEEL BARS

13. Weight: 35,7012

14. Measurement: 1984 cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 16025

3. **Seal Number:** —

4. **Name of Vessel:** Finance CTA 11/15

5. **Port of Loading:** Baltimore

6. **Date Shipped from Loading Port:** Sept 30, 1974

041

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 2

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K 55272

12. **Description of Commodity:** 18 Boxes Steel Bars

13. **Weight:** 45,162 lbs

14. **Measurement:** 1988 CuFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

C0332

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 104039

3. **Seal Number:** #0835 + 0836 042

4. **Name of Vessel:** Commerce V22

5. **Port of Loading:** NY

6. **Date Shipped from Loading Port:** Oct 21, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** /

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** See Remarks (pg #2)

12. **Description of Commodity:** 30 Cases - Steel Bars

13. **Weight:** 47,976 lbs

14. **Measurement:** 2153 CUFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 100169

3. Seal Number: 0837 + 0838

4. Name of Vessel: Commerce V.22

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: 10-23-74

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55296, K55118, K55193, K55369, K55347,
K55170, K55257, K55323, K55171, K55330, ~~K55~~
K55362 K55192

12. Description of Commodity:
25 CASES STEEL BARS
5 CASES STEEL COILS

13. Weight:
36948

14. Measurement:
2009 Cuft.

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

044

1. Carrier: Sea - Land

2. Container Number: Seau 102345

3. Seal Number: 0841 + 0842

4. Name of Vessel: Commerce V22

5. Port of Loading: New York

6. Date Shipped from Loading Port: Oct 30, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: See Remarks - (pg #2)

12. Description of Commodity:
7cases - steel Rods
4 " Plastic Pellets
4 " Machine Parts
2 cases Liquid He
1 case Aluminum Ingots

13. Weight: 41,861 lbs

14. Measurement: 2073 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 107628

3. Seal Number: —

4. Name of Vessel: Exchange V. 27

5. Port of Loading: N.Y.

6. Date Shipped from Loading Port: NOV 26, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: - see remarks (pg #2)

12. Description of Commodity: 11 cases - Flintgrain
4 cases - Steel Bars

13. Weight: 44,635 lbs

14. Measurement: 1253 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

C0355

SCHEDULE A

046

1. **Carrier:** Sea-Land

2. **Container Number:** Sealand 45-544

3. **Seal Number:** 0859 + 0860

4. **Name of Vessel:** Trade

5. **Port of Loading:** N.Y.

6. **Date Shipped from Loading Port:** Dec. 16, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 1

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K55175 K55187 K55183 K55184 K551
K55181 K55180, K55179, K55176, K551
K58722 K55153, K55156

12. **Description of Commodity:** See remarks - pg#2

13. **Weight:** 44,328 lbs

14. **Measurement:** 1712 CFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O
I.P.O. BOX 3 PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 104931

047

3. **Seal Number:** # 0858 + 0857

4. **Name of Vessel:** Commerce

5. **Port of Loading:** N.Y.

6. **Date Shipped from Loading Port:** Dec 16, 1974

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 1

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** P.O. #'s K58078, K55219, K55271.

12. **Description of Commodity:**
1 case - Fiberfrax
1 case - Steel wire
9 cases - " Bars
29 Drums Preservative Oil

13. **Weight:** 44,925 lbs

14. **Measurement:** 1568 CuFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 104487

3. Seal Number: –

4. Name of Vessel: Galloway

5. Port of Loading: New York

6. Date Shipped from Loading Port: Dec 19, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K 58795 S.O. 36318

12. Description of Commodity: 80 drums - Cutting Oil

13. Weight: 36,400 lbs

14. Measurement: 1012 cuft

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO AM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

C0358

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 58438

3. Seal Number: —

4. Name of Vessel: Galway

5. Port of Loading: Oakland

6. Date Shipped from Loading Port: Dec 20, 1974

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: P.O.K55272 S.O. 36319

12. Description of Commodity: 7 Boxes - Steel Bars

13. Weight: 38,910 lbs

14. Measurement: 155 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SLV 17244

3. Seal Number: –

4. Name of Vessel: Trade V25

5. Port of Loading: ~~[illegible]~~ Baltimore

6. Date Shipped from Loading Port: Jan 6, 1975

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: /

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K 55272

12. Description of Commodity: 14 Boxes - Steel Bars

13. Weight: 36,231 lbs

14. Measurement: 276 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SLU 17168 051

3. **Seal Number:** —

4. **Name of Vessel:** Trade V 25

5. **Port of Loading:** Baltimore

6. **Date Shipped from Loading Port:** 1/6/75

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 2

Number/Date, Ocean Carrier B/L:

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K55272

12. **Description of Commodity:** 13 BOXES - Steel Bars

13. **Weight:** 33,553 lbs

14. **Measurement:** 236 CUFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

052

1. **Carrier:** Sea-Land
2. **Container Number:** SEAU 174816
3. **Seal Number:** —
4. **Name of Vessel:** EXCHANGE
5. **Port of Loading:** Baltimore
6. **Date Shipped from Loading Port:** Jan. 21, 1974
7. **Port of Discharge:** PUSAN, KOREA
8. **Number/Date, Interconex B/L:** 2
9. **Number/Date, Ocean Carrier B/L:**
10. **Date Received at Discharge Point:**
11. **Purchase Order Number:** K55271
12. **Description of Commodity:** 17 Boxes - Steel Bars
13. **Weight:** 43,758 lbs
14. **Measurement:** 311 CFT
15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.
16. **Consignee Under Ocean Carrier B/L:**
    MAJOR GEN. YOO SAM SUK
    COMMANDING GENERAL
    NATIONAL DEFENSE ARSENAL
    DONG RE P.O.
    I.P.O. BOX 37, PUSAN, KOREA
17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SeAU 17531

3. **Seal Number:** -

4. **Name of Vessel:** Exchange

5. **Port of Loading:** Baltimore

Date Shipped from Loading Port: Jan 21, 1975

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 3

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K55271

12. **Description of Commodity:** 17 Boxes - Steel Bars

13. **Weight:** 43,758 lbs

14. **Measurement:** 311 CFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

C0371

SCHEDULE A

054

1. Carrier: Sea - Land

2. Container Number: SEAU 106010

3. Seal Number: —

4. Name of Vessel: EXCHANGE

5. Port of Loading: Chicago

6. Date Shipped from Loading Port: Jan 24, 1975

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K 60182

12. Description of Commodity: 80 Drums - Petroleum Lube Oil

13. Weight: 38,720 lbs

14. Measurement: 880 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land
2. Container Number: SEA U51397
3. Seal Number: ~~Finance~~ 055
4. Name of Vessel: Finance
5. Port of Loading: N.Y.
6. Date Shipped from Loading Port: Jan. 31, 1975
7. Port of Discharge: PUSAN, KOREA
8. Number/Date, Interconex B/L: 1
9. Number/Date, Ocean Carrier B/L:
10. Date Received at Discharge Point:
11. Purchase Order Number: K 55344
12. Description of Commodity: 15 Boxes Steel Strips
13. Weight: 38,392 lbs
14. Measurement: 240 CUFT
15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.
16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

1.

SCHEDULE A

1. **Carrier:** Sea-Land

2. **Container Number:** SEAU 54041

056

3. **Seal Number:**

4. **Name of Vessel:** Finance

5. **Port of Loading:** NY

6. **Date Shipped from Loading Port:** 1/31/75

7. **Port of Discharge:** PUSAN, KOREA

8. **Number/Date, Interconex B/L:** 2

9. **Number/Date, Ocean Carrier B/L:**

10. **Date Received at Discharge Point:**

11. **Purchase Order Number:** K55197, K55348, K55344

12. **Description of Commodity:** 14 Boxes - Steel Stripes

13. **Weight:** 38,114 lbs

14. **Measurement:** 224 CFT

15. **Shipper Under Ocean Carrier B/L:** INTERCONEX, INC.

16. **Consignee Under Ocean Carrier B/L:**

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. **Shipper Under Interconex, Inc. B/L:** INTERCONEX, INC.

C9378

SCHEDULE A

1. Carrier: Sea - Land

2. Container Number: SEAU 17439

3. Seal Number: —

4. Name of Vessel: Commerce

5. Port of Loading: Baltimore

6. Date Shipped from Loading Port: 2/5/75

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 1

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55272 K55390 K55391

12. Description of Commodity: 17 BOXES - Steel Bars

13. Weight: 43,326 lbs

14. Measurement: 335 CUFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:

MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

SCHEDULE A

1. Carrier: Sea-Land

2. Container Number: SEAU 17231

3. Seal Number: —

4. Name of Vessel: COMMERCE

053

5. Port of Loading: Baltimore

6. Date Shipped from Loading Port: Feb. 5, 1975

7. Port of Discharge: PUSAN, KOREA

8. Number/Date, Interconex B/L: 2

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K55271, K55272

12. Description of Commodity: 17 Boxes - Steel Bars

13. Weight: 43,401 LBS

14. Measurement: 335 CFT

15. Shipper Under Ocean Carrier B/L: INTERCONEX, INC.

16. Consignee Under Ocean Carrier B/L:
MAJOR GEN. YOO SAM SUK
COMMANDING GENERAL
NATIONAL DEFENSE ARSENAL
DONG RE P.O.
I.P.O. BOX 37, PUSAN, KOREA

17. Shipper Under Interconex, Inc. B/L: INTERCONEX, INC.

(S E R V E D)
(JUNE 5, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

June 5, 1975

050

RECEIVED
JUN 6 1975
INTERCONEX, INC.

NO. 75-19

COLT INDUSTRIES OPERATING CORP.

v.

INTERCONEX, INC., ET AL.

NOTICE OF FILING OF COMPLAINT

Notice is hereby given that a complaint filed by Colt Industries Operating Corp. against Interconex Inc., Sea-Land Service, Inc., American Export Lines, Inc., and U. S. Lines, Inc. was served June 5, 1975.

The complaint alleges that complainant has been assessed charges for ocean carriage in excess of that provided in the applicable tariff of respondents in violation of section 18 of the Shipping Act, 1916.

Francis C Hurney
Francis C. Hurney
Secretary

(S E R V E D)
(JUNE 6, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

060

June 6, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

NOTICE OF ASSIGNMENT

RECEIVED
JUN 11 1975
INTERCONEX, INC.

The above-entitled proceeding has been assigned to me. All communications and documents pertaining to this matter should refer to the docket number and title and be addressed to me at the Federal Maritime Commission, 1100 L Street, N. W., Washington, D. C. 20573.

William Beasley Harris
William Beasley Harris
Administrative Law Judge

cc Mr. Sutcliffe

BEFORE THE

FEDERAL MARITIME COMMISSION

061

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket No. 75-24

COMPLAINT

1. Complainant is a corporation, having its principal office at 444 Madison Avenue, New York, New York 10010. At all times pertinent to this complaint, complainant has been a non-vessel-operating common carrier by water.

2. Respondent Sea-Land Service, Inc. is a corporation, having its principal office at Fleet Street, P. O. Box 2000, Elizabeth, New Jersey 07201. At all times pertinent to this complaint, Sea-Land has been a common carrier by water, subject to the Shipping Act of 1916.

3. Respondent American Export Lines is a corporation, having its principal office at 17 Battery Place, New York, New York 10004. At all times pertinent to this complaint, American Export Lines has been a common carrier by water, subject to the Shipping Act of 1916.

4. Respondent U.S. Lines, Inc. is a corporation, having its principal office at 1 Broadway, New York, New York 10004. At all times pertinent to this complaint, U.S. Lines, Inc. has been a common carrier by water, subject to the Shipping Act of 1916.

5. By complaint served on June 5, 1975, Colt Industries initiated a proceeding (Colt Industries Operating Corp. v. Interconex, Inc., et al., Docket No. 75-19) before this Commission against Interconex, Sea-Land, American Export and U.S. Lines. A copy of that complaint (minus Schedule A thereto which comprises two bound volumes, each weighing several pounds) is annexed hereto as Exhibit 1, and is made a part of this complaint; and Schedule A thereto is incorporated herein by reference as if physically attached.

6. The Colt complaint alleges that Interconex, as a non-vessel-operating common carrier by water, prepared ocean bills of lading in which the cubic measurements and/or weight of Colt cargo shipped from U.S. ports to Korea via Interconex were overstated, and that as a consequence, Interconex received compensation in excess of that provided in its tariff. The Colt complaint also alleges that by reason of the alleged overstated measurements and/or weights, the underlying common carriers by water, i.e., Sea-Land, American Export and U.S. Lines, received compensation in excess of that provided in the applicable tariff issued by the Far East Conference and/or other applicable tariffs issued by conferences of which those lines are members.

7. The Colt complaint requests that the respondents in Docket 75-19 be required to pay reparation to Colt in an amount which it estimates at $500,000.00.

8. On information and belief, if Interconex is finally required to pay reparation to Colt under or in consequence of the Colt complaint in Docket 75-19, the underlying carriers -- respondents herein -- will or may be required to indemnify Interconex for all or a part of such reparation.

9. Interconex therefore files this complaint (in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure) against the underlying carriers (respondents herein) on the ground that they are or may be liable to Interconex for all or part of Colt's claim against it, and to toll the statute of limitations with respect to Interconex's claim against respondents.

WHEREFORE, Interconex requests that the Commission hear its charges against respondents; that, if after hearing Colt's complaint in Docket No. 75-19, the Commission orders Interconex to pay reparation to Colt, it also order those underlying carriers to pay reparation to Interconex in such amount as may be due; and that this complaint be consolidated with the proceedings in Docket No. 75-19.

Respectfully submitted,

INTERCONEX, INC.

By
Jon Stephens, President

Ralph J. Sutcliffe
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

George F. Galland
Robert L. McGeorge
Galland, Kharasch, Calkins & Brown
1054 - 31st Street, N.W.
Washington, D. C. 20007
Telephone: (202) 333-2200
Attorneys for Complainant

Dated June 23, 1975

VERFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Jon T. Stephens, being first duly sworn, states that he is President of Interconex, Inc., and is the person who signed the foregoing complaint; that he has read it and knows the contents thereof; that the facts therein set forth without qualification are true, and that the facts stated therein upon information and belief, he believes to be true.

Jon T. Stephens

Subscribed and sworn to before me, a notary public in and for the State of New York, County of New York, this 23rd day of June, 1975.

Alan Bischoff
(Notary Public)

ALAN BISCHOFF
NOTARY PUBLIC, State of New York
No 24-[illegible]9253
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977.

My Commission expires ______________

Docket No.

BEFORE THE FEDERAL
MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP,
on its own behalf and as agent
for the Government of the
Republic of Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND
SERVICE, INC., AMERICAN EXPORT
LINES, INC., and U.S.
LINES, INC.,

Respondents.

COMPLAINT

Paul, Weiss, Rifkind, Wharton & Garrison

Attorneys for Complainant

345 PARK AVENUE. NEW YORK. N. Y. 10022
644-8000

All communications should be referred
to Sidney S. Rosdeitcher, Esq.

~~067~~

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FEDERAL MARITIME COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE FEDERAL MARITIME COMMISSION

---x

COLT INDUSTRIES OPERATING CORP, on its own behalf and as agent for the Government of the Republic of Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC., and U.S. LINES, INC.,

Respondents.

---x

COMPLAINT

Docket No. 75-

SERVED
JUN 5 1975
FEDERAL MARITIME COMMISSION

Complainant Colt Industries Operating Corp, by its attorneys Paul, Weiss, Rifkind, Wharton & Garrison and Haight, Gardner, Poor & Havens, alleges upon information and belief as follows:

1. Complainant Colt Industries Operating Corp, (hereinafter referred to as Colt Industries) is a corporation duly organized and existing pursuant to the laws of the State of Delaware. Its principal place of business is at 430 Park Avenue, New York, New York. Among other activities, Colt Industries is involved, through its Firearms Division (formerly Colt's Inc.), whose principal place of business is at 150 Huyshope Avenue, Hartford, Connecticut, in the manufacture of firearms and purchase of equip-

ment for the production of firearms, for export purposes as well as domestic consumption. At all times hereinafter alleged, complainant Colt Industries was and now is the duly authorized agent of the Government of the Republic of Korea, in the negotiation and performance of the transactions hereinafter alleged.

2. Respondent Interconex, Inc., whose principal office and place of business is 444 Madison Avenue, New York, New York, was at all pertinent times and now is an independent ocean freight forwarder and/or a nonvessel operating common carrier by water, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

3. Respondent Sea-Land Service, Inc., whose principal office and place of business is at Fleet Street, P.O. Box 2000, Elizabeth, New Jersey, was at all pertinent times and now is a common carrier by water engaged in transportation between, among other ports, ports in the United States and Korea, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

4. Respondent American Export Lines, Inc., whose principal office and place of business is at 17 Battery Place, New York, New York, was at all pertinent times and now is a common carrier by water engaged in transportation between, among other ports, ports in the United States and Korea, and as such is

subject to the provisions of the Shipping Act of 1916, as amended.

5. Respondent U.S. Lines, Inc., whose principal office and place of business is at 1 Broadway, New York, New Yor was at all pertinent times and now is a common carrier by water engaged in transportation between, among other ports, ports in the United States and Korea, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

6. On or about November 11, 1971, respondent Intercone Inc., as an independent ocean freight forwarder, entered into a contract with complainant Colt Industries to provide all necessar services for the movement of goods and merchandise from the United States and United States ports to ports in Korea. Said goods were purchased for and consigned to the Government of the Republic of Korea by complainant Colt Industries pursuant to a March 13, 1971 contract between those two parties. On or about July 26, 1972, and pursuant to a letter from respondent Interconex Inc. dated December 27, 1971, said respondent assumed towards complainant by amendment to the November 1971 contract the obligations of a nonvessel operating carrier by water, in accordance with the provisions of said respondent's tariff on file with this Commission.

7. Between the dates of on or about July 28, 1972 to and including February 5, 1975, respondent Interconex, Inc. arranged for the ocean carriage of numerous shipments of merchandise furnished by complainant Colt Industries and consigned to the Government of the Republic of Korea. Said ocean carriage was undertaken by a number of vessels, owned by respondents Sea-Land Service, Inc., American Export Lines, Inc., or U.S. Lines, Inc. The particulars of each such shipment, to the extent presently known to complainant, are set forth in Schedule A, attached to this complaint, and incorporated by reference herein. Complainant will furnish further particulars, in the form of amended schedules, as soon as it is in a position to do so.

8. In preparing ocean bills of lading under its contractual obligation for such shipments, respondent Interconex, Inc., either fraudulently, negligently or by reason of gross negligence and recklessness misstated the cubic measurements and/or calculation of weights of the shipments in question, as a consequence of which said respondent charged, demanded, collected and received from complainant compensation in excess of that provided for by the said respondent's published tariff, and in violation of Section 18 of the Shipping Act of 1916, 46 U.S.C. Section 817(b)(3). Such particulars of excessive compensation as are presently known to complainant are set forth in Schedule

A to this complaint. Complainant will furnish further particulars in the form of amended schedules, as soon as it is in a position to do so.

9. By reason of the facts misstated by Interconex, Inc. alleged above, respondents Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc., as their several interests appear or shall appear from Schedule A attached hereto or subsequent supplements thereto, have received compensation for ocean carriage in excess of that provided for by the Far East Conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question, in violation of Section 18 of the Shipping Act of 1916, 46 U.S.C. Section 817(b)(3).

10. As a result of the facts alleged in this complaint, complainant and/or its principal, the Government of the Republic of Korea, has been damaged by reason of excessive charges for ocean freight, in a total amount presently estimated to be about $500,000. Complainant reserves the right to amend this complaint to allege such further or different amounts as it may later be advised.

11. Complainant designates the City of New York, County of New York, State of New York, as the desired place for hearings in this proceeding.

WHEREFORE, complainant prays that respondent be required to answer the charges herein; and that after due hearing and investigation the Commission direct the payment to complainant by respondents, as their liabilities may appear, of full reparation for the unlawful charges hereinabove described, in such sums as the Commission may determine to be proper as an award of reparation; and that such other and further order or orders be made as the Commission determines to be proper in the premises.

Dated this 30th day of May , 1975

David C. Eaton

COLT INDUSTRIES OPERATING CORP
By David C. Eaton
President Firearms Division
150 Huyshope Avenue
Hartford, Connecticut

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
By Sidney S. Rosdeitcher, Esq.
A Member of the Firm
Attorneys for Complainant
345 Park Avenue
New York, New York 10022

HAIGHT, GARDNER, POOR & HAVENS
By Charles Haight, Esq.
A Member of the Firm
Attorneys for Complainant
1 State Street Plaza
New York, New York

Verification

STATE OF Connecticut
COUNTY OF Hartford : ss.: Hartford

DAVID C. EATON, being duly sworn on oath deposes and says that he is President, Firearms Division, Colt Industries Operating Corp and is the person who signed the foregoing complaint; that he has read the complaint and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

David C. Eato

Subscribed and sworn to before me, a notary public in and for the State of Connecticut, County of Hartford this 30th day of May, A.D. 197[illegible].

My Commission expires My Commission Expires March 31, 1977.

(SERVED)
(JUNE 23, 1975)
(FEDERAL MARITIME COMMISSION)

074

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

June 23, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ORDER GRANTING EXTENSION OF TIME IN WHICH TO ANSWER COMPLAINT OR OTHERWISE PLEAD

The complaint in this proceeding filed June 4, 1975, was served June 5, 1975, and notice of the filing of the complaint was published in the Federal Register June 17, 1975, at page 25625 of Vol. 40 No. 117 (FR Doc. 75-15749). The Commission has directed that hearings shall commence on or before December 5, 1975.

Answer to the complaint was due to be filed on or before June 25, 1975, however, all of the four (4) named respondents herein, with stated "no objection" by the complainant, seek an extension of time within which to answer the complaint or otherwise plead. The respondent Interconex, Inc. (Interconex) served its motion June 18, 1975 (filed June 20, 1975), respondent United States Lines, Inc. (U.S. Lines) served and filed its motion June 19, 1975, Sea-Land Service, Inc. (Sea-Land) filed a telex request June 20, 1975, and American Export Lines. Inc. (AEL) served and filed June 20, 1975. As indicated above, each states he is authorized to state that the complainant has no objection to the extension. Interconex seeks an extension to July 9, 1975, U.S. Lines, Sea-Land and AEL seek an extension to July 10, 1975.

Wherefore, upon consideration of the requests for extension, the reasons given and the absence of any objection, it is this 23rd day of June, 1975,

Ordered,

The time within which the respondents may answer or otherwise plead to the complaint served herein June 5, 1975, be and hereby is extended from June 25, 1975 to July 10, 1975.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573

OFFICE OF THE SECRETARY

June 26, 1975

Robert L. McGeorge, Esq.
Galland, Kharasch, Calkins & Brown
1054 Thirty-first Street, N. W.
Washington, D.C. 20007

Dear Mr. McGeorge:

Reference is made to your recently filed "complaint" filed on behalf of Interconex Inc. I am returning this complaint to you inasmuch as it does not allege a violation of the Shipping Act as required by section 22 of the Shipping Act and 502.62 of the Commission's Rules of Practice. Further, the Commission has no rule similar to Rule 13(g) of the Federal Rules of Civil Procedure which would allow filing of a cross-claim.

Very truly yours,

Francis C. Hurney
Francis C. Hurney
Secretary

Enclosures

June 30, 1975

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573

Re: Interconex, Inc. v. Sea-Land
Service, Inc., et al.

Dear Mr. Hurney:

This acknowledges your letter of June 26, returning the complaint filed on June 24, 1975 by Interconex, Inc. against Sea-Land Service, Inc. and two other respondents. The reason for returning it, according to your letter, is that "it does not allege a violation of the Shipping Act" and that the Commission has no rule similar to Rule 13(g) of the Federal Rules of Civil Procedure allowing the filing of a cross-claim.

The complaint, with the requisite copies for the Commission and the respondents, is redelivered to you with this letter, which constitutes (a) a request for reconsideration of the Secretary's action in rejecting the complaint, and (b) a formal demand that the Complaint be accepted as such by the Commission, as of the date of the original filing -- i.e., June 24, 1975.

The letter of June 26 indicates that the refusal to file the complaint is the Secretary's personal act, based on his personal decision. The language of the letter is that "I am returning this complaint to you...." The fair interpretation of this statement is (a) that the refusal to file the complaint is a position taken on the Secretary's personal initiative and responsibility, and (b) that the Commission has not passed upon the sufficiency of the complaint, or been afforded an opportunity to do so.

Our reasons for insisting that the complaint be accepted as and when initially filed are:

1. The Validity of a Complaint is a Matter for Determination by the Commission.

The statutory authority for the filing of complaints before the Commission is found only in Section 22 of the Shipping Act. It provides that if a complaint is not satisfied, the "Commission shall, except as otherwise provided in this Act, investigate it...." There is no provision for delegation of the Commission's authority to its Secretary or any other official to investigate or to decline investigation. A complaint, being an adversary document, is presumably dismissible on motion; but no such motion has been made, and if it were made, it would in the first instance be the responsibility of the presiding officer in the complaint proceeding (under Rule 10(g)) after notice and hearing to interested parties. The absence from Section 22 of authority to delegate is of special significance when that section is compared to Section 17 of the Interstate Commerce Act, which explicitly authorizes the ICC to delegate functions to divisions of that agency.

The rejection of the complaint by the Secretary not only exceeds the Secretary's authority, but is contrary to the procedure contemplated by the Commission's Rule 5(b), which provides that if a complaint fails to indicate the Sections of the Acts alleged to have been violated or clearly to state facts which support the allegations, "the Commission may, on its own initiative, require the complaint to be amended to supply such further particulars as it deems necessary." The plain purpose of Rule 5(b) is to avoid the harsh and irreparably damaging procedure to which the Secretary resorted. We note in this connection that the complaint against Interconex in Docket 75-19 is grossly incomplete in its omission to furnish details required in the Commission's Rule 5(b) -- and that despite such deficiency, it was not rejected in that proceeding. Since the Interconex complaint charges exactly the same violations against Sea-Land, et al. which the Colt complaint charges against them, any defect in the Interconex complaint is equally a defect in the Colt complaint, rendering it equally subject to rejection.

2. The Complaint is Substantively and Formally Sufficient.

The statement in the Secretary's letter that the rejected complaint does not allege a violation of the Shipping Act is grossly and explicitly incorrect. The Interconex complaint physically annexes the complaint of Colt Industries in Docket 75-19 and recites (paragraph 5) that the Colt complaint "is made a part of this complaint." Paragraph 9 of the Colt complaint states that by reason of the same facts alleged in support of Colt's claim against Interconex, three of the Colt respondents -- Sea-Land Service, American Export Lines, and U.S. Lines --

> "...have received compensation for ocean carriage in excess of that provided for by the Far East conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question, in violation of Section 18 of the Shipping Act of 1916...."

The Colt complaint also alleges (paragraph 6) that Interconex is a non-vessel-operating common carrier, and that it shipped Colt's cargoes via Sea-Land, American Export and U.S. Lines. It follows that any statutory violations by way of deviation from applicable tariffs on the part of those three carriers (respondents in the Interconex case) were violations committed against Interconex as a shipper because an NVO is a shipper in relation to an underlying carrier. Paragraph 8 of the Interconex complaint alleges that if Interconex is required to pay reparation to Colt, the respondents in the Interconex case "will or may be required to indemnify Interconex for all or part of such reparation."

Interconex has no desire or motivation to charge Sea-Land, American Export, or U.S. Lines unconditionally as violators of their tariffs. But if Colt proves in its case that they did commit such violations, and if the same proof makes Interconex liable to Colt, Interconex must protect itself by claiming indemnity from the carriers who overcharged it. An unconditional charge of illegality is not essential. Rule 5(c) recognizes that alleged violations "if continued in the future" suffice to sustain a complaint and to toll the statute of limitations.

The Interconex complaint gives the respondents exact notice as to what Interconex is claiming against them, in exactly the same terms as the Colt complaint. No amount of amending could make the charge clearer. Accordingly, the Interconex complaint fulfills to the limit the legitimate office of a pleading as a no[illegible]giving document. No conceivable reason is suggesti[illegible] to why the Commission or its staff should require mo[illegible]

Whether or not Rule 13(g) of the Federal Rules of Civil Procedure governs the FMC procedure is of no consequence. The reference in the Interconex complaint (paragraph 9) to Rule 13(g) was explanatory of the general nature and purpose of the Interconex complaint. That complaint was not in any technical sense a cross-complaint in the Colt proceeding, but is an independently filed complaintiin a separate proceeding. If it is rightly viewed to be in the natuse of a cross-claim, that view may or may not justify consolidation of the Interconex case with the Colt case, but in no event does it justify dismissal of the Interconex complaint -- by the Commission's Secretary, or by the Commission, or by any other authority.

Rejection of the complaint can mean that Interconex will lose irretrievably day by day, a portion of its indemnity claim against the respondents. The right to amend on re-file will afford no retroactive protection, because rejection means that there is nothing to amend.

Accordingly, Interconex requests that the Secretary's rejection of its complaint be reconsidered and that the complaint be accepted as, and as of the time when initially filed, with effect from June 24, 1975.

Sincerely,

George F. Galland

Enclosures
bcc: Ralph Sutcliffe, Esq.
Jon T. Stephens

McG

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573

OFFICE OF THE SECRETARY

081

July 2, 1975

George F. Galland, Esq.
Galland, Kharasch, Calkins & Brown
1054 Thirty-first Street, N.W.
Washington, D. C. 20007

Dear Mr. Galland:

Reference is made to your June 30, 1975 letter requesting reconsideration of the rejection of a complaint filed on behalf of Interconex Inc. against Sea-Land Service, et al. The complaint was rejected for failure to allege a violation of the Shipping Act.

Upon reconsideration, we have determined to receive the complaint and effect service thereof. It is felt that enough doubt exists in regard to the question of whether incorporating a complaint of another constitutes a sufficient allegation of a violation of the Shipping Act, that it should be allowed to be raised and determined in the proceeding.

Very truly yours,

Francis C Hurney

Francis C. Hurney
Secretary

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573

OFFICE OF THE SECRETARY

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082

July 2, 1975

George F. Galland, Esq.
Galland, Kharasch, Calkins & Brown
1054 31st Street, N.W.
Washington, D. C. 20007

Dear Mr. Galland:

This is to advise that the complaint which you filed on behalf of Interconex, Inc. against Sea-Land Service, Inc., et al., has been assigned Docket No. 75-24.

Service of this complaint was made upon all respondents on July 2, 1975, and answer is due to be filed with the Commission within twenty (20) days from this date.

Very truly yours,

Joseph C. Polking

Joseph C. Polking
Assistant Secretary

cc: Ralph J. Sutcliffe, Esq.

SERVE
083 JULY 3, 1975
FEDERAL MARITIME COMMISS

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 2, 1975

NO. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC.
UNITED STATES LINES, INC.

NOTICE OF FILING OF COMPLAINT

Notice is hereby given that a complaint filed by Interconex, Inc. against Sea-Land Service, Inc., American Export Lines, Inc. and United States Lines, Inc. was served July 2, 1975.

The complaint annexes and makes a part thereof the complaint in Docket 75-19 - Colt Industries Operating Corp. v. Interconex, et al., and alleges that respondent carriers are or may be liable to Interconex for all or part of any reparation Interconex may be required to pay as a consequence of the complaint in Docket 75-19.

Hearing in this matter shall commence on or before December 5, 1975.

Francis C. Hurney

Francis C. Hurney
Secretary

(S E R V E D)
(JULY 3, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 3, 1975

NO. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.

NOTICE OF ASSIGNMENT

The above-entitled proceeding has been assigned to me. All communications and documents pertaining to this matter should refer to the docket number and title and be addressed to me at the Federal Maritime Commission, 1100 L Street, N. W., Washington, D. C. 20573.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

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FEDERAL MARITIME
COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL MARITIME COMMISSION

ANSWER OF

SEA-LAND SERVICE, INC.

DOCKET NO. 75-19

COLT INDUSTRIES OPERATING CORP

V.

INTERCONEX, INC., SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC. AND U.S. LINES, INC.

Sea-Land Service, Inc. (Sea-Land), a respondent, for its answer to the complaint in this proceeding, states the following with respect to each numbered paragraph of the complaint:

1 and 2. Respondent does not possess sufficient knowledge to either confirm or deny complainant's statements.

3. The principal office of Sea-Land Service, Inc. is located at 10 Parsonage Road (mailing address Post Office Box 900), Edison, New Jersey 08817. Respondent admits to the allegation in all other respects.

4 and 5. To respondent's knowledge, the carriers named are common carriers by water in the foreign commerce of the United States. Respondent cannot confirm that either of them engaged in transportation between the affected ports at the pertinent times.

6. Respondent is without information to either confirm or deny the statements in this paragraph.

7. Respondent admits having been engaged in the business of furnishing common carrier transportation by water from Atlantic and Gulf ports of the United States to ports in the Republic of Korea during the time period specified. At all relevant times these services were performed under the provisions of tariffs published by the Far East Conference and lawfully on file with the Federal Maritime Commission. At all pertinent times Sea-Land was, and now is, a member of that Conference. Vessels employed by respondent in performing its service were and are owned by Sea-Land or chartered from others.

Concurrently respondent also offered to the shipping public a common carrier service from Atlantic and Gulf ports of the United States to ports in the Republic of Korea via joint rail and water routes under the provisions of tariffs lawfully filed by Sea-Land jointly with the Federal Maritime Commission and the Interstate Commerce Commission. This joint rail and water service is respondent's Sea-Land **Bridge Ⓡ Service**, generally known as mini-landbridge service.

The particulars of shipments attributed to respondent, as set forth in Schedule A of the complaint, have been examined with the result that four of them, identified by Pages 00069, 00199, 00290 and 00358 cannot be verified as having moved in respondent's service. However, the date of shipment shown for No. 00069 is February 13, 1973 which is considerably more than two years prior to the date of the complaint; thus, it is time-barred by the provisions of Section 22, Shipping Act, 1916. Respondent admits to having carried the remaining forty-six shipments attributed to it.

8. Respondent is without knowledge about, nor is it a party to, the contractual obligations between complainant and respondent Interconex, Inc., and is unable to comment on this allegation.

9. Respondent denies the allegation. The compensation received by respondent Sea-Land was calculated in accordance with the rates and provisions named in its Westbound U.S.A. - Far East Joint Container Freight Tariff No. 201, FMC No. 74 and ICC No. 72, upon cargo particulars provided by, and request for service from, Interconex, Inc.

10. Respondent denies the allegation. If there has been any damage suffered, it is due to actions by other parties and Sea-Land has no liability.

11. Respondent has no objection to complainant's designation of New York City as the place for hearings.

ARGUMENT AND MOTION FOR DISMISSAL

On each of the shipments attributed to Sea-Land as identified in Schedule A of the complaint, excepting the four it has been unable to verify, the contract of carriage for the transportation service was solely between Sea-Land Service, Inc. and other participating carriers in its Sea-Land ® Bridge Service, on the one hand, and Interconex, Inc., on the other. Each bill of lading issued by respondent shows the shipper to be "Interconex, Inc.,444 Madison Avenue, New York, N.Y. 10022" and the consignee to be "Major General Yoo Sam Suk, Commanding General, 2nd R.O.K. Arsenal, Pier #3, Pusan, Korea." On none of them does complainant Colt Industries appear as a party in the contract of carriage, nor is there any indication that Interconex, Inc. was acting as an agent. All bookings for vessel space and other arrangements with Sea-Land for transportation were made by Interconex, Inc. All transportation charges assessed by Sea-Land were billed to Interconex, Inc. as the shipper, and all payments to Sea-Land were received from them. In no instance was the transportation arranged for or made by complainant Colt Industries.

It is plainly evident from the complaint that Interconex entered into/ contracts of carriage with, and issued its own bill of lading as a non-vessel-operating common carrier to, the complainant Colt Industries. Interconex charged to and collected its transportation charges from Colt Industries without intervention by Sea-Land. In a subsidiary and unrelated transaction Interconex utilized the services of Sea-Land, a vessel operating common carrier, as an underlying carrier for at least a portion of the transportation service it was performing for Colt Industries under its separate contract of carriage. The transportation which is the subject of this complaint was an arrangement entirely and exclusively between Interconex, Inc. and Colt Industries. The complainant's recourse for recovery of alleged damages suffered is to the carrier with whom it entered into the contract of carriage, i.e.: Interconex, Inc. Complainant Interconex has no standing to bring action against Sea-Land for alleged damages suffered.

Wherefore, in view of the foregoing, respondent Sea-Land Service, Inc. moves that it be dismissed as a respondent and its participation in this proceeding be discontinued.

Respectfully submitted,

SEA-LAND SERVICE, INC.
P. O. BOX 900
EDISON, NEW JERSEY 08817

BY: PETER M. KLEIN
GENERAL ATTORNEY

ELDERED N. BELL, JR.
DIRECTOR, REGULATORY AFFAIRS

FRANK HILJER, JR.
COMMERCE MANAGER

JULY 8, 1975

VERIFICATION

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Frank Hiljer, Jr., being first duly sworn on oath deposes and says that he is Commerce Manager, Sea-Land Service, Inc. and is the person who signed the foregoing answer and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

Frank Hiljer Jr.
FRANK HILJER, JR.

Subscribed and sworn to before me, a notary public in and for the State of New Jersey, County of Middlesex, this 8th day of July, A.D. 1975.

DOROTHY VECCHIARELLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 15, 1977

CERTIFICATE OF SERVICE

I certify that I have this day served copy of the foregoing answer on Sidney S. Rosdeitcher, Esquire, attorney for the complainant; James P. Moore, Esquire, attorney for respondent United States Lines, Inc.; James N. Jacobi, Esquire,attorney for respondent American Export Lines, Inc., and on Interconex, Inc. by sending same properly addressed via first class U.S. mail, postage prepaid.

Dated at Edison, New Jersey this 8th day of July, 1975.

Frank Hiljer Jr

FRANK HILJER, JR.

BEFORE THE

FEDERAL MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP., on its
own behalf and as agent for the Government
of the Republic of Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC., and
U.S. LINES, INC.,

Respondents.

FMC Docket
No. 75-19

MOTION TO DISMISS

Pursuant to Rule 5(m) and 5(d) of the Commission's Rules of Practice and Procedure (46 CFR 502.73 and 502.64) Respondent United States Lines, Inc. (USL) hereby moves that the complaint in the above captioned proceeding be dismissed with prejudice as to USL for the reasons stated below.

INTRODUCTION

By complaint served June 15, 1973, Colt Industries Operating Corporation (hereinafter COLT) on its own behalf and as agent for the Government of the Republic of Korea has alleged that Interconex, Inc. (hereinafter INTERCONEX, a Non-Vessel Operating Common Carrier (NVOCC), in the course of discharging a transportation contract with COLT, "fraudulently, negligently or by reason of gross negligence and recklessness misstated the cubic measurements and or calculation of weights of the shipments in question, as a consequence of which said Respondent [INTERCONEX] charged, demanded, collected and received from complainant, compensation in excess of that provided for by said respondent's [INTERCONEX's] published tariff."

Appendix A to the Complaint (in two volumes) is alleged to be a summary of 279 shipments for movement from the United States to Korea tendered to INTERCONEX between July 28, 1972 and February 5, 1975 under an alleged contractual arrangement between COLT and INTERCONEX under which INTERCONEX "assumed towards Complainant... the obligations of a non-vessel operating carrier by water in accordance with the provision of said Respondent's [INTERCONEX's] tariff on file with this Commission."

Contrary to these allegations and without alleging the existence of any relationship between COLT and United States Lines, Inc. (USL) the complaint names USL as a respondent as its interest may appear with reference to Appendix A to the complaint and asserts that USL has received compensation for ocean carriage in excess of that provided for by the conference tariffs involved. Each of the Summary sheets in Appendix A lists "Shipper under

Ocean Carrier B/L" as "INTERCONEX, INC." The alleged summary sheets contained in Appendix A do not set forth "Charges Billed by Ocean Carrier". Instead, the only allegations are made with respect to "Charges Billed by INTERCONEX, INC."

COLT alleges that it and/or its principal, the Government of the Republic of Korea has been damaged by INTERCONEX's misstatement of cargo weights and measurements in an amount estimated at $500,000.00 and seeks reparations from INTERCONEX.

As detailed below, it is clear that neither the text of the Complaint nor Appendix A thereto, read separately or in combination, alleges the facts necessary to state a cause of action against United States Lines, Inc. or otherwise support a claim for reparations in any amount against USL.

I. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST USL

A. There Is No Contract Of Carriage Between COLT And USL Upon Which To Base This Complaint.

Respondent, USL hereby moves for the dismissal of that portion of the Complaint directed against USL. The basis for such dismissal appears in the Complaint itself where, at pages 3 and 4, Complainant describes first the alleged contractual arrangement between itself and Respondent INTERCONEX and then the source of the allegedly misstated cargo weights and measurements.

The allegation that USL was among the vessel operating common carriers who performed the ocean carriage of these shipments for INTERCONEX, as shipper, pursuant to the published rates, rules, terms and conditions of appropriate conference tariffs does not constitute or create a shipper/carrier relationship between Complainant and USL upon which Complainant can seek to recover reparations from USL or otherwise challenge USL's discharge of its common carrier duties to shipper, INTERCONEX.

In MacMillan Co. v. United Cargo Corp., 11 SRR 1143 (1970), a complaint was filed against an NVOCC alleging that respondent was overpaid for the transportation of complainant's goods.

In denying respondent NVOCC's motion to implead the underlying carriers, it was found that:

> "The bills of lading set forth in the complaint were issued by respondent [NVOCC] and the charges made by respondent were pursuant to its [the NVOCC's] tariff on file with the Commission. The contracts of affreightment upon which the complaint is founded are between complainant [shipper] and respondent [NVOCC] and the complaint alleges that the shipments were tendered to respondent [NVOCC] through direct dealings between complainant and respondent [NVOCC]."

In short, disputes between COLT and its chosen NVOCC (INTERCONEX) arising out of INTERCONEX's performance of a contractual arrangement with Complainant are matters which do not and cannot call into question USL's application of its published tariff rates and rules to the cargo data provided by the shipper INTERCONEX.

The allegation contained in paragraph 9 of the Complaint to the effect that, as its interest may appear, USL has received compensation in excess of that provided for by the conference tariffs involved in violation of 46 U.S.C. 817(b) (3) is clearly unsupported by and inconsistent with the other allegations in the Complaint.

Appendix A admits that INTERCONEX, not COLT, was "Shipper Under Ocean Carrier B/L". INTERCONEX, not USL, is alleged to have misstated the weights and measurements of the shipments in question. There is no allegation that the shipments were misdescribed on the bills of lading issued by USL to INTERCONEX, as opposed to the Bills of Lading issued by INTERCONEX to COLT. INTERCONEX, not USL, billed COLT Industries for freight due in accordance with INTERCONEX's own tariff. INTERCONEX, not USL, was paid by Complainant. And, finally, only charges billed by INTERCONEX are listed in Appendix A to the Complaint.

To the extent that COLT prays for reparations to be paid by USL, as its interest may appear, the complaint is deficient on its face for failing to allege that any part of the injury claimed arose out of a breach of transportation contract or other duty owed by USL to COLT. Furthermore, the facts that are alleged clearly amount to an admission that COLT dealt only with Respondent INTERCONEX, a carrier in its own right, and it is only the conduct of, charges by, and payments to INTERCONEX which are alleged as the basis for this complaint. Therefore, the complaint should be dismissed in its entirety as to Respondent USL.

B. The Alleged Violation of Section 18(b) (3) Should Be Dismissed As Contrary To The Facts Alleged In The Complaint.

After reciting the alleged contractual and tariff provisions under which COLT selected and employed Respondent INTERCONEX to act as the carrier for its shipments to Korea and admitting that INTERCONEX was "Shipper Under Ocean Carrier B/L", and that USL applied the published conference rates to shipments tendered by INTERCONEX, the complaint asserts without logical or factual support that USL violated Section 18(b) (3) of the Shipping Act (46 U.S.C. 817(b) (3)).

Not only is there no support for the conclusory allegation in paragraph 9 of the Complaint that USL received compensation in excess of that provided for in the published conference tariffs, but also, the factual allegations in paragraphs 6, 7, and 8 of the Complaint make it clear that Complainant is not asserting that USL did anything but apply the published tariff rates and rules to the cargo data provided. Thus, no possible basis for an 18(b) (3) allegation against USL has been stated in the Complaint.

None of the entries provided in Appendix A to the complaint list the "Charges Billed By Ocean Carrier". Each of the alleged summaries does include the statement that "Ocean Carrier's

Charges Paid By And Borne By: INTERCONEX, INC." No entries are made in the spaces provided for "Ocean Carrier's Charges Paid By INTERCONEX on:" and no entries are made in the spaces provided for "Charges That Should Have Been Billed By Ocean Carrier".

This complete lack of any allegations as to ocean freight billed by USL to "Shipper" INTERCONEX coupled with the admission that USL simply applied the published conference rates to the cargo descriptions provided by INTERCONEX demonstrates that neither the text of the complaint nor Appendix A thereto can support the allegation that, USL violated Section 18(b) (3).

C. As A Matter Of Law, COLT Would Not Be Entitled To Seek Reparations From USL Even If It Were The Shipper.

As noted above, COLT has not stated a cause of action against USL. INTERCONEX, not COLT, was the shipper, but, even if, COLT had been the shipper - an impossibility in view of the contrary allegations that COLT dealt only with the NVOCC INTERCONEX - reparations could not be awarded to COLT (or to INTERCONEX) under existing FMC case law. The alleged overcharges are expressingly said to be attributable to INTERCONEX's misstatement of "the cubic measurements and/or calculations of weights of the shipments in question",1/ (Complaint p.4,

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1/ There is no allegation that such misstatements were made or carried over to to USL's Bills of Lading.

paragraph 8) and alleges that the shipments were made under the Far East Conference Tariff and other applicable tariffs.[2]

During the time period covered by the Complaint (i.e. July 28, 1972 to February 5, 1975) Rule 9 of the Far East Conference Tariff No. 25 (FMC No. 5)[3] at page 104 required that:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier...."

With respect to containers listed in Appendix A as moving on USL's vessels from California to Korea, the Pacific Westbound Conference Local Freight Tariff No. 3 (FMC No. 8) was applicable for the period in question up until January 15, 1975 at which time it was cancelled and superceded by Pacific Westbound Conference Local Freight Tariff No. 4 (FMC No. 12). The former addressed "overcharges" in Rule 53 at page 43 and the latter addressed "overcharges" in Rule 53 at page 30. Both of these tariffs employ the same language as the Far East Conference Tariff and require claims "based on alleged errors in description, weight and/or measurement" to be presented in writing before the shipment leaves the custody of the carrier.

Language identical to that quoted above and applicable to the shipments involved in this proceeding was recently examined construed by the Commission in Kraft Foods v. Moore McCormack Lines, Inc., FMC Dkt. 73-44, 14 SRR 603 (1974), Petition For Re-Consideration Denied. There the Commission denied reparations for alleged overcharges based upon cargo mismeasurement "because the Complainant failed to comply with tariff Rule 16[4] and therefore [the Commission] need not consider whether Complainant did or did not sustain its burden of proof as to the correct measurement or weight of the shipment." (*Id.* at p. 605)

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[2] Reference to which is an accepted matter for official notice.

[3] Cancelled by Far East Conference Tariff No. 26 (FMC No. 8), effective March 1, 1975 wherein the identical Rule 9 appears at p. 126.

The Commission explained that there, as here:

> "Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.***
>
> Applying this mandate to the case before us, it can be seen that Moore McCormack had no alternative here but to comply with the rules of its tariff on file. Therefore, in order that Kraft Food's claim be considered, it was required to furnish its claim to Moore McCormack prior to the time the shipment left Moore McCormack's custody. The provisions of Rule 16 above are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or re-measuring be conducted in a certain way and before the shipment at issue leaves the custody of the carrier. This rule represents a term and condition of the tariff on file to which the carrier has no choice but to adhere scrupulously. Because Kraft Foods did not comply with these terms, reparation here could not be granted.
>
> This conclusion in no way restricts the right of any person to file a complaint pursuant to the provisions of Section 22 of the Shipping Act, 1916, within two years after the cause of action accrues. However, unless the shipper submits a claim involving contested weight or measurement prior to the shipment leaving the custody of the carrier (Rule 16), the merit of any such claim must be governed by the weights and measure-

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[4] The counterpart of Rules 9 and 53 in the conference tariffs involved here.

> *ments shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rates.* In this case, the shipper should have sought re-weighing or re-measuring prior to the shipment leaving the custody of the carrier as required by Rule 16 of the Moore McCormack tariff." (*Id.* at 606 - emphasis added)

In view of this Commission decision, which is the controlling law in this case, the Complaint is further deficient on its face insofar as it seeks recovery of reparations based on disputed measurements of cargo weight and cube asserted long after the shipments in question have left the custody of USL.[5]

Even if COLT had alleged a shipper/carrier relationship with USL rather than employing INTERCONEX, as an NVOCC, its failure to comply with the published tariff rules concerning the presentation of such overcharge claims, would as a matter of law, prevent COLT from seeking reparations from USL. Thus, it is doubly clear that the Complaint should be dismissed as to USL.

II. COMPLAINANTS" ACTION IS UNTIMELY WITH RESPECT TO SHIPMENTS MADE BEFORE JUNE 5, 1973

In addition to the substantive deficiencies apparent on the face of the Complaint and discussed in Section I of this motion, the first one hundred and seventy (170) of the two hundred and seventy-nine (279) shipments summarized in

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[5] See also the Commission order in *P.P.G. Industries, Inc. v. United States Lines, Inc.*, served April 8, 1975, 14 SRR 1657.

Appendix A to the Complaint clearly cannot procedurally support a claim for reparations.[6]

In accordance with Section 22 of the Shipping Act of 1916 and Rule 5(c) of the Commission's Rules of Practice and Procedure, the first 170 shipments on which Complainant seek to recover alleged overcharges by way of reparations are untimely and barred by the two-year limitations period. As pertinent Section 22 of the Act (46 U.S.C. 821) provides:

> "The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment... of full reparation..."

and Rule 5(c) (46 C.F.R. 502.63) requires:

> "Complaints seeking reparation shall be filed within two (2) years after the cause of action accrues."

The Complaint and Appendix A thereto, establish, that the container movements summarized under consecutive numbers "00001" through "00170" in Appendix A were "Shipped From Loading Port" on or before May 25, 1973.

Since this Complaint was not filed with the Commission until June 4, 1975, the cut-off date for reparations even under an allowable cause of action would be June 4, 1973 and that portion of the Complaint seeking reparations for alleged overcharges on the first 170 shipments listed in Appendix A must be dismissed as barred by the two-year statute of limitations.

---

[6] Volume 1 of Appendix A to the Complaint alleges that USL was the Ocean Carrier on the shipments numbered "00001" through "00170" except for shipment number "00069".

WHEREFORE, United States Lines, Inc. respectfully requests that the Complaint against it in this matter be dismissed with prejudice.

Respectfully submitted,

Russel T. Weil

James P. Moore

KIRLIN, CAMPBELL & KEATING
Attorneys for Respondent
United States Lines, Inc.
900 17th Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion have been served upon the parties or where indicated counsel for the parties to this proceeding by first class mail, postage prepaid, this 10th day of July, 1975.

James P. Moore

BEFORE THE

FEDERAL MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP.,
Complainant
v.
INTERCONEX, INC., ET AL.,
Respondents.

Docket No. 75 - 19

ANSWER AND COUNTERCLAIM
OF
INTERCONEX, INC.

Respondent, Interconex, Inc., (ICX) answers the complaint of Colt Industries Operating Corp. (Colt) as follows:

1. ICX is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 1 that Colt was and now is the duly authorized agent of the Government of Korea in the negotiation and performance of the transaction referred to in its complaint.

2. ICX denies the allegation in paragraph 2 that it acted as an independent ocean freight forwarder with respect to the shipments in question; but admits the remaining allegations in that paragraph.

3. ICX admits the allegations in paragraphs 3 through 5.

4. ICX is without knowledge or information sufficient to form a belief as to truth of the allegation in paragraph 6 that Colt purchased goods and merchandise for and consigned them to the Republic of Korea pursuant to a contract of March 13, 1971 between those parties. ICX admits the remaining allegations in that paragraph.

5. ICX admits the allegations in paragraph 7.

6. ICX denies the allegations in paragraph 8.

7. ICX denies the allegation in paragraph 9 that it misstated cubic measurements and/or calculation of weights of Colt cargo (except for the four instances noted in Appendix A to this Answer). Any incorrect measurements or weights used by ICX were merely its restatements of figures supplied by Colt or its agents. ICX is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in that paragraph.

8. ICX denies the allegations in paragraph 10.

By way of affirmative defense, ICX alleges:

FIRST DEFENSE

9. With four exceptions noted in Appendix A to this Answer, the cubic measurements and weights stated by ICX in its bills of lading for the shipments in question were the same as, or less than the measurements and weights declared by or on behalf of Colt. All shipments were tendered to ICX in sealed containers. Colt was bound by its own declarations.

SECOND DEFENSE

10. Colt failed to provide ICX written notice of any claim for for refund or adjustment of charges within 20 days from the date when the goods were or should have been delivered, as required by paragraph 8 of the relevant ICX bills of lading.

THIRD DEFENSE (PARTIAL)

11. As to shipments covered by ICX Freight Tariff No. 3 (effective August 21, 1974), Colt failed to present claims based upon alleged errors in weight or measurement before the shipments in question left the custody of the carrier, as required by Rule 10 of that tariff.

FOURTH DEFENSE (PARTIAL)

12. As to goods which were or should have been delivered before June 5, 1974, Colt failed to file its complaint or to bring suit on such shipments within one year of such date, as required by paragraph 8 of the relevant ICX bills of lading.

FIFTH DEFENSE (PARTIAL)

13. As to ICX bills of lading issued before June 5, 1973, reparation is barred by the requirement of Section 22 of the Shipping Act of 1916 that reparation complaints must be filed within two years after the cause of action accrued.

SIXTH DEFENSE (PARTIAL)

14. Colt has refused, in violation of tariff requirements and of Section 16 of the Shipping Act, to pay freight to ICX amounting to $169,406.62 on shipments embraced within Colt's complaint. Such sum constitutes an offset against any reparation which may be awarded Colt.

SEVENTH DEFENSE (PARTIAL)

15. Colt, as alleged agent of the Government of Korea, is not the real party in interest in this dispute.

EIGHTH DEFENSE (PARTIAL)

16. Colt has failed to state a claim upon which relief may be granted.

As a counterclaim against Colt, ICX on information and belief, alleges:

19. All cargo to which the complaint relates was tendered by Colt to ICX in sealed containers, with weight and measurement data furnished by or on behalf of

Colt. ICX had no means of verifying such data.

20. The freight legally due on Colt's shipments was in each instance, the product of the applicable ICX tariff rate multiplied by the declared weight or measurement (as applicable) of the cargo stowed in each container.

21. ICX freight clerks deducted a fraction of Colt's declared weight or measurement as an estimated allowance for broken stowage — such deduction being erroneous because unsupported by any evidence that Colt's declarations were inaccurate. Further, ICX clerks erroneously applied the rate for "machinery and parts, n.o.s." to cargoes properly classifiable as "cargo, n.o.s." under the relevant tariffs. The freight which should have been charged is set forth in Appendix A, submitted herewith (except as to four shipments, out of a total of 379 shipments, for which ICX records are incomplete).

22. The freight legally payable by Colt to ICX was $930,053.60 in excess of the freight actually billed by ICX (disregarding the four shipments for which records are incomplete); and such sum is now owed by Colt to ICX, in addition the sum of $169,406.62 as set forth in paragraph 14 above.

23. Colt's underpayments of freight as above alleged, and its withholding of freight payments totalling $169,406.62 as hereinabove set forth, and its filing of the complaint herein constitute unlawful attempts of Colt, by means of unjust or unfair devices or means to obtain transportation by water of property at less than the rates or charges otherwise applicable, in violation of Section 16 of the Shipping Act, to Interconex's damage in the sum of $1,099,460.72.

WHEREFORE, ICX requests an order (a) dismissing the complaint and (b) directing Colt to pay reparation to ICX in the amount of $1,099,460.72.

Respectfully submitted,

/s/ George F. Galland
George F. Galland
Robert L. McGeorge
Galland, Kharasch, Calkins & Brown
1054 Thirty-First Street, N.W.
Washington, D. C. 20007
(202) 333-2200
Attorneys for Interconex, Inc.

VERIFICATION

George F. Galland, being duly sworn, states that he is one of the attorneys for Interconex and is the person who signed the foregoing Answer and Counterclaim; that he has read it and knows the contents thereof; and that the facts therein set forth are true to the best of his knowledge and belief — such knowledge and belief being based on information received from Interconex.

/s/
George F. Galland

Sworn to before me this 10th day
of July, 1975.

/s/
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Answer and Counterclaim upon the following attorneys for complainant by first class mail, postage prepaid, this 10th day of July, 1975:

Sydney S. Rosdeitcher, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022

Charles Haight, Esquire
Haight, Gardner, Poor & Havens
1 State Street Plaza
New York, New York 10004

/s/
Robert L. McGeorge

Before the
FEDERAL MARITIME COMMISSION

DOCKET NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

MOTION OF AMERICAN EXPORT LINES, INC. TO DISMISS THE COMPLAINT OF COLT INDUSTRIES, INC. AS TO IT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Comes now American Export Lines, Inc. (AEL), by its attorneys, and hereby moves to dismiss the complaint of Colt Industries, Inc. (Colt) as to it, or, in the alternative, for summary judgment, on the following grounds.

I.

Colt's Claim Is Time-Barred

Colt's complaint for reparation in this docket was filed with the Commission on June 4, 1975. Th[illegible] shipment on an AEL vessel reflected in Schedule A to the complaint (138 A attached to the accompanying Affidavit of Nicholas D. Pasco, Senior Vice-President of AEL, which is attached hereto and incorporated herein) states that the shipment of 81 drums of metal cutting oil and phosphate acid left Philadelphia on April 2, 1973 on the AEL vessel DEFIANCE. AEL assessed the normal Far East Conference rate in effect at the time of shipment and billed Interconex $3,960.00 based upon the information provided by the shipper's load and count. Subsequently, on May 4, 1973, AEL issued a manifest correction amending its billing down to the correct amount of $3,514.50 due to the fact that it discovered a project tariff rate that was applicable. The drums were discharged in Pusan on May 4, 1973 and Interconex paid the freight on May 16, 1973 (Affidavit, paragraph 4). The Interconex charges were paid by Colt on May 14, 1973 (138 A).

Pursuant to Section 22 of the Shipping Act, 1916, as amended, 46 U.S.C. 821, the Commission has authority to order reparation to any person who proves a complaint against a carrier, if the complaint is filed within two years after the cause of action accrued. Specifically, the statute provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby.
>
> . . .
>
> The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such

violation. (See also Rule 5(c) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.63.)

It is perfectly clear from the complaint itself that Colt has failed to state a claim upon which reparations can be granted because the complaint was filed later than two (2) years after the alleged cause of action accrued and accordingly the complaint must be dismissed as to AEL.

II.

The Claim Is Barred by the Kraft Doctrine

A shipper is bound to the weight or cubic measurements of the goods contained in the bill of lading when seeking reparation for overcharges based upon disputed weights or measurements, and the claim is not brought to the attention of the carrier until after the time specified is an effective tariff rule.

In this respect Rule 9 of the Far East Freight Conference Tariff No. 25, FMC No. 5, in effect at the time of the one AEL shipment in question, provided that:

> Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

No such claim was presented to AEL by anyone prior to the filing of the instant complaint more than two (2) years after the cargo was delivered. (See Affidavit, paragraph [illegible], and Attachment D thereto.)

In Kraft Foods v. Moore-McCormack Lines, Inc., 14 SRR 603 (FMC, 1974), the FMC denied a claim for reparation for an alleged overcharge where the shipper failed to comply with the exact same tariff rule language, No. 16 of the South and East Africa Conference, providing that claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier before the shipment involved leaves the carrier's custody. In that case the majority held that reparation must be denied because the shipper failed to comply with the tariff rule. The Commission reasoned that Section 18(b)(3) of the Shipping Act, which provides in pertinent part that,

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs . . .

makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included therein, which are as much a part of the tariff as are the rates themselves. The FMC held that this valid tariff clause must be strictly applied by it and that "unless the shipper submits a claim involving contested weights or measurements prior to the shipment leaving the custody of the carrier (there Rule 16, here Rule 9) the merit in such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rules." 14 SRR 606. The correctness of the decision is confirmed by the fact that unless the carrier is notified of such a claim of errors in weight or measurement before the cargo leaves its custody, it will be unable to verify the claimant's contentions (Affidavit, paragraph 6).

Accordingly, the claim must fall based upon the Kraft doctrine.

III.

There Is No Relationship between Complainant Colt and Respondent AEL Which Could, under Any Circumstances, Create or Sustain an Overcharge Claim or Complaint

On the one shipment in question in this complaint (138 A), the contract of carriage for the transportation from Philadelphia to Pusan was solely between Interconex as shipper and AEL as carrier. Colt's name does not appear as a party on the AEL Bill of Lading No. 82468 covering this shipment, nor did AEL know that Interconex was acting as an agent for Colt. All the arrangements for ocean transportation were made by Interconex and AEL was unaware of any relationships which might have existed between Colt and Interconex (Affidavit, paragraph 5, and Attachments B and C thereto). The freight was billed by AEL to and paid by Interconex (Affidavit, paragraph 4). AEL had absolutely no privity with Colt, which was a stranger to the transaction between AEL and Interconex. What Interconex charged to Colt under a contract or under a tariff as an NVOCC was done without AEL's knowledge or any interference that could affect Colt's interests. No actions of AEL had an impact upon Colt, and thus Colt lacks standing to maintain this action. Complainant Colt's sole avenue for recovery of the alleged overcharge by the NVOCC is by a claim against that carrier - Interconex - with which it entered into a contract of carriage. Certainly, it has not pleaded a claim upon which relief could be granted against AEL. See MacMillan Co. v. United Cargo Corp., 11 SRR 1143 (FMC, 1970).

Conclusion

Wherefore, for the foregoing reasons, the complaint of Colt should be dismissed as to AEL, or, in the alternative, AEL should be granted relief in the nature of summary judgment against Colt for all of its claim.

Respectfully submitted,

KURRUS and JACOBI

By James N Jacobi
JAMES N. JACOBI
2000 K Street, N. W.
Washington, D. C. 20006

Attorneys for Respondent
American Export Lines, Inc.

July 10, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of July 1975 served the foregoing motion upon all parties of record in this proceeding by mailing a copy to each such person via first-class mail, postage prepaid.

James N Jacobi
James N. Jacobi

Before the
FEDERAL MARITIME COMMISSION

Docket No. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC.
UNITED STATES LINES, INC.

MOTION OF AMERICAN EXPORT LINES, INC. TO DISMISS THE COMPLAINT OF INTERCONEX, INC. AS TO IT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Comes now American Export Lines, Inc. (AEL), by its attorneys, and hereby moves pursuant to Rules 5(d) and (m) of the Rules of Practice and Procedure (46 C.F.R. 502.64 and 502.73) to dismiss the complaint of Interconex, Inc. (Interconex) as to it, or, in the alternative, for summary judgment on the following grounds.

I.

Interconex's Claim Is Procedurally Deficient and Factually Unfounded

On June 24, 1975 Interconex filed its complaint in the nature of a cross-claim (which, as far as we are aware, is not provided for by the

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Commission's Rules) in the above-referenced docket which was served on AEL on July 2, 1975. The complaint annexes and makes a part thereof the complaint in Docket 75-19, Colt Industries Operating Corp. v. Interconex, et al., and alleges that the three respondent ocean carriers will or may be required to indemnify Interconex and that the underlying carriers are or may be liable to Interconex for all or part of any reparations Interconex may be required to pay as a consequence of the complaint in Docket 75-19 and to toll the statute of limitations with respect to Interconex's claim, whatever it may be, against the three carrier respondents. This "complaint" for indemnification appears to be nothing more than a notification that a complaint for reparations may or will be filed if Colt prevails in its action against Interconex in Docket 75-19. See Rule 5(c), 46 C.F.R. 502.63.

Interconex's claim is procedurally deficient because it is vague, speculative, conjectural and does not allege any specific violation of the Shipping Act by the common carriers by water, nor does it constitute an independent cause of action separate from Docket 75-19. It fails to allege that AEL breached its transportation contract with Interconex or any other duty owed by AEL to Interconex. The nebulous complaint does not set forth the specific relief on other affirmative action sought nor the factual details regarding such items as shipments, commodities, tariffs, and the amount of damage as required by Rule 5(b), 46 C.F.R. 502.62.

In short, the complaint is so deficient that the Commission should either strike it from its docket or, as contemplated by Rule 5(b), require it to be amended in order to supply such particulars as to place it in substantial compliance with the Commission's Rules of Practice and Procedure.

The Interconex "counterclaim" is particularly curious when it is judged in the context of the Affidavit of Nicholas D. Pasco, Senior Vice-President of AEL, given in connection with Docket No. 75-19. This Affidavit, which is attached hereto and incorporated herein, states that on the only Interconex shipment on an AEL vessel reflected in Schedule A to the complaint in Docket No. 75-19, AEL billed its shipper Interconex $3,514.50, whereas Interconex in turn billed its shipper Colt $4,281.76 (Affidavit, paragraph 4). Thus, there is no possibility that AEL could be responsible to indemnify or pay reparation to Interconex in connection with the Colt complaint.

II.

Interconex's Claim Is Time-Barred

Interconex's complaint for indemnification or reparations in this docket was filed with the Commission on June 24, 1975. The one and only shipment on an AEL vessel reflected in Schedule A to the incorporated complaint in Docket 75-19 (138 A attached to the accompanying Affidavit of Nicholas D. Pasco, Senior Vice-President of AEL) states that the shipment of 81 drums of metal cutting oil and phosphate acid left Philadelphia on April 2, 1973 on the AEL vessel DEFIANCE. AEL assessed the normal Far East Conference rate in effect at the time of shipment and billed Interconex $3,960.00 based upon the information provided by the shipper's load and count. Subsequently, on May 4, 1973, AEL issued a manifest correction amending its billing down to the correct amount of $3,514.50 due to the fact that it discovered a project tariff rate that was applicable. The drums were discharged in Pusan on May 4, 1973 and Interconex paid the freight on May 16, 1973 (Affidavit, paragraph 4).

Pursuant to Section 22 of the Shipping Act, 1916, as amended, 46 U.S.C. 821, the Commission has authority to order reparation to any person who proves a complaint against a carrier, if the complaint is filed within two years after the cause of action accrued. Specifically, the statute provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby.
>
> . . .
>
> The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation. (See, also, Rule 5(c) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.63.)

It is perfectly clear from the complaint itself that Interconex has failed to state a claim upon which reparations can be granted because the complaint was filed later than two (2) years after the alleged cause of action accrued and accordingly the complaint must be dismissed as to AEL.

III.

The Claim Is Barred by the Kraft Doctrine

A shipper, such as Interconex, is bound to the weight or cubic measurement of the goods contained in the bill of lading when seeking reparation for overcharges based upon disputed weights or measurements, and the claim is not brought to the attention of the carrier until after the time specified is an effective tariff rule.

In this respect Rule 9 of the Far East Freight Conference Tariff No. 25, FMC No. 5, in effect at the time of the one AEL shipment in question, provided that:

> Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

No such claim was presented to AEL by Interconex or anyone prior to the filing of the instant complaint more than two (2) years after the cargo was delivered. (See Affidavit, paragraph 6, and Attachment D thereto.)

In Kraft Foods v. Moore-McCormack Lines, Inc., 14 SRR 603

(FMC, 1974), the FMC denied a claim for reparation for an alleged overcharge where the shipper failed to comply with the exact same tariff rule language, No. 16 of the South and East Africa Conference, providing that claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier before the shipment involved leaves the carrier's custody. In that case the majority held that reparation must be denied because the shipper failed to comply with the tariff rule. The Commission reasoned that Section 18(b)(3) of the Shipping Act, which provides in pertinent part that,

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs . . .

makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included therein, which are as much a part of the tariff as are the rates themselves. The FMC held that this valid tariff clause must be strictly applied by it and that "unless the shipper submits a claim involving contested weights or measurements prior to the shipment leaving the custody of the carrier (there Rule 16, here Rule 9) the merit in such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rules." 14 SRR 606. The correctness of the decision is confirmed by the fact that unless the carrier is notified of such a claim of errors in weight or measurement before the cargo leaves its custody, it will be unable to verify the claimant's contentions (Affidavit, paragraph 6).

Accordingly, the claim must fall based upon the Kraft doctrine.

Conclusion

Wherefore, for the foregoing reasons [and particularly if the Commission's Rules are indeed to be applied in order to secure the just, speedy and inexpensive determination of every proceeding (Rule 1a, 46 C.F.R. 502.1; see, also, Rule 21(b), 46 C.F.R. 502.402)], the complaint of Interconex should be immediately dismissed as to AEL, or, in the alternative, AEL should be granted relief in the nature of summary

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judgment against Interconex for whatever it construes its claim to be.

Respectfully submitted,

KURRUS and JACOBI

By James N. Jacobi
JAMES N. JACOBI
2000 K Street, N. W.
Washington, D. C. 20006

Attorneys for Respondent
American Export Lines, Inc.

July 22, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of July 1975 served the foregoing Motion upon all parties of record in this proceeding by mailing a copy to each person via first-class mail, postage prepaid.

James N. Jacobi
James N. Jacobi

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Before the
FEDERAL MARITIME COMMISSION

DOCKET NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

City of Washington)
) ss:
District of Columbia)

NICHOLAS D. PASCO, being duly sworn, deposes and says:

1. I am a Senior Vice-President of American Export Lines, Inc., (AEL), an American-flag common carrier by water, with its principal place of business at 17 Battery Place, New York, New York 10004.

2. AEL was served with a complaint by Colt Industries, Inc. in the above-referenced docket on or about June 6, 1975 along with respondents Interconex, Inc. (Interconex), Sea-Land Service, Inc. (Sea-Land) and United States Lines, Inc. (USL) demanding reparations in a total amount presently estimated by Colt to be about

$500,000.00. The gravamen of the complaint is based upon an allegation that Interconex, as a non-vessel-operating common carrier by water, prepared ocean bills of lading in which the cubic measurements and/or calculation of weights of Colt cargo shipped from U. S. ports to Korea via Interconex were overstated, and that as a consequence Interconex received compensation in excess of that provided in its tariff. The Colt complaint also alleges that by reason of the alleged overstated measurements and/or weights, the three ocean carriers, i.e., Sea-Land, USL and AEL, received compensation in excess of that provided for by the Far East Conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question.

3. Under my direction and control, a careful check was made of Schedule A to the complaint, which comprises two exceedingly bulky volumes of shipping documents. This analysis located only one (1) shipment from Interconex in our service and indicates that 99% of the cargo was shipped via USL, less than 1% was shipped by Sea-Land, and AEL carried this one little shipment which probably represents less than one-tenth of 1% of the total involved.

4. Our examination of the documents indicates that on this one shipment transported on our vessel DEFIANCE out of Philadelphia on April 2, 1973 to Pusan, AEL carried 81 drums of metal cutting oil

and phosphate acid (see 138 A of Schedule A of the Complaint, copy enclosed as Attachment "A"). This cargo in drums was discharged Pusan May 4, 1973. We assessed the normal Far East Conference rate in effect at the time of shipment and thus we originally billed Interconex $3,960.00 based upon particulars provided by the shipper's load and count regarding this movement which was packed and sealed by the ship[illegible] Subsequently, on May 5, 1973, we amended our billing down to the correct amount of $3,514.50 due to the fact that we discovered a project tariff rate that was applicable. Interconex paid the freight on May 16, 1973. Copies of our Bill of Lading No. 82468 and Manifest Correction No. 359-61239 are attached as "B" and "C" hereto. Colt is claiming that they were billed $4,281.76, by Interconex, which they paid on May 14, 1973 (see Attachment "A", items 21 and 24).

5. AEL was and is without privity with Colt and not a party to any arrangements made between Colt and Interconex, and what arrangements Interconex had with Colt via contract or tariff was not known to us. Our service was provided at the request of Interconex, and our Bill of Lading shows the shipper to be Interconex and the consignee to be Major General Yoo Sam Suk, Commanding General, 2d R.O.K. Arsenal, Pier #3, Pusan, Korea. Colt's name does not appear as a party, nor is there any indication that Interconex was acting as an agent for Colt, nor did we know that from any other source.

6. We are frankly quite amazed that Colt would have the temerity to bring formal suit against AEL for this one shipment and embroil us in expensive and senseless litigation, particularly when neither it nor Interconex nor anyone else ever made a claim against us until the filing of the instant complaint. In this regard, the applicable Far East Conference tariff effective on the date of the one AEL shipment, Freight Tariff No. 25, FMC No. 5, 2nd Revised Page 104, effective May 27, 1970, Rule 9 (see Attachment "D") provides in pertinent part that -

> Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

No such notice of a challenge to the weights or measurements on which the charges were based was ever given to us. Since the shipment left our custody over two (2) years ago, AEL is prevented from verifying claimant's contentions and must of necessity be governed by the weights and measurements shown on the bill of lading for the transportation and the applicable, proper and lawful tariff rate which we used to bill Interconex.

Any complaint for reparations which Colt may have would be against Interconex and not AEL.

Nicholas D. Pasco
NICHOLAS D. PASCO
Senior Vice-President
American Export Lines, Inc.

Subscribed and sworn to before me this 10th day of July 1975.

Eileen F. Guthrie
Notary Public

My Commission expires Jan. 31, 1977

SCHEDULE A

1. Carrier: American Export

2. Container Number: INTU 424249

3. Seal Number:

4. Name of Vessel: Defiance

5. Port of Loading: Philadelphia

6. Date Shipped from Loading Port: April 2, 1973

7. Port of Discharge: Pusan, Korea

8. Number/Date, Interconex B/L: 1 I[illegible]erconex, Inc.

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K53639, K53705

12. Description of Commodity: 8/ < 73 Drums Metal Cutting Oil
8 Drums Phosphate Acid

13. Weight: 38,361 lbs.

14. Measurement: 1980

15. Shipper Under Ocean Carrier B/L: Interconex, Inc.

16. Consignee Under Ocean Carrier B/L:
Major Gen. Yoo Sam Suk
Commanding General
National Defense Arsenal
Dong Re P.O.
I.P.O. Box 37, Pusan, Korea

17. Shipper Under Interconex, Inc. B/L: Interconex, Inc.

18. Consignee Under Interconex, Inc. B/L:
Major Gen. Yoo Sam Suk
Commanding General
National Defense Arsenal
Dong Re P.O.
I.P.O. Box 37, Pusan, Korea

19. Rate Applied by Interconex, Inc.:
1980 cu. ft. 1980 cu. ft.
80.25/40 cu. ft. 2.25/40 cu. ft.

20. Rate applied by Ocean Carrier:

✓21. Charges Billed by Interconex, Inc.: $4,281.76 ✓

22. Charges Billed by Ocean Carrier: X

23. Interconex, Inc. Charges Paid by: Colt Industries

✓24. Interconex, Inc. Charges Paid by Colt Industries on:
May 14, 1973
Check # 17036

25. Interconex, Inc. Charges Borne by: The Government of the Republic of Korea

26. Ocean Carrier's Charges Paid and Borne by: Interconex, Inc.

27. Ocean Carrier's Charges Paid by Interconex, Inc. on:

28: Charges that should have been Billed by Interconex, Inc.

29. Charges that should have been Billed by Ocean Carrier: X

30. Date Container Picked Up at Warehouse:

AMERICAN EXPORT LINES, INC.

BROADWAY, NEW YORK, NEW YORK 10[illegible] U.S.A.

B

SHIPPER / EXPORTER
Intercomex, Inc.
22 East 6[illegible] Street,
New York, N. Y. 10021

DOCUMENT NO.

EXPORT REFERENCES
131

CONSIGNEE
ORDER OF
Major General Yoo Sam Sub-Commanding General
2nd R.O.K. Arsenal-
Pier #3
Pusan, Korea

FORWARDING AGENT--REFERENCES
Francesco Parisi, Inc. FMC # 770

POINT AND COUNTRY OF ORIGIN
U. S. A.

ADDRESS ARRIVAL NOTICE TO
Major General Yoo Sam Sub-Commanding General
National Defens eArsenal-Dong [illegible] P.O.
1 P. O. Box 37
Pusan, Korea

DOMESTIC ROUTING / EXPORT INSTRUCTIONS

PIER
Packer Avenue Terminal

EXPORTING CARRIER (VESSEL)
Defiance

PORT OF LOADING
Philadelphia

ONWARD INLAND ROUTING

PORT OF DISCHARGE
Pusan, Korea

FOR TRANSSHIPMENT TO

CARRIER'S RECEIPT		PARTICULARS FURNISHED BY SHIPPER		
MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
INTU 424249	8300 ST/40 -3 1 8000 ST/4	PROJECT LICENSE [illegible] SAID TO CONTAIN CONTAINER-[illegible] TO [illegible] SHIPPERS EXCLUSIVE USE CONTAINER 7425 W/M ST/40	38,381	1980
THESE COMMODITIES LICENSED BY U.S. FOR ULTIMATE DESTINATION PUSAN DIVERSION CONTRARY TO U.S. LAW PROHIBITED. MILITARY CARGO		75 DRUMS-METAL CUTTING OIL 4 DRUMS-PHOSPHORIC ACID KOREAN GOVERNMENT CARGO-GOODS OR EQUIPMENT TO BE USED [illegible] OF [illegible], SHIPPED TO PUSAN, KOREA UNDER THE MUTUAL ASSISTANCE PROGRAM BETWEEN THE U.S. GOVERNMENT AND THE KOREAN GOVERNMENT CONSIGNED TO THE COMMANDING OFFICER, ARSENAL, NO. 2, VIA PANAMA CANAL R.O.K. ARMY, PUSAN, KOREA		

IN CONNECTION WITH FREIGHT. SEE CLAUSES 14 AND 16 OF THIS BILL OF LADING.

______ @ ______	per 100 lbs.	$	
______ @ ______	per 2240 lbs.	$	
1980 ft. in. @ 80.00	per 40 cu. ft.	$	3,960.00
______ kgs. @ ______	per 1000 kgs.	$	
______ cbm. @ ______	per cbm.	$	
~~1980 74.00~~		$	~~3663.00~~
		$	
		$	
	TOTAL	$	3960.00

IN ACCEPTING THIS BILL OF LADING, the Shipper, Consignee, Holder hereof, and Owner of the goods, agree to be bound by all of its stipulations, exceptions and conditions, whether written, printed or stamped on the front or back hereof, as well as the provisions of the above Carrier's published Tariff Rules and Regulations, as fully as if they were all signed by such Shipper, Consignee, Holder or Owner, and it is further agreed that Containers may be stowed on Deck, as per Clause 6.

IN WITNESS WHEREOF, the Master of the said vessel has affirmed to (Number) 3 bills of lading, all of this tenor and date, ONE of which being accomplished, the others to stand void.

By: AMERICAN EXPORT LINES, INC.
FOR THE MASTER

BILL OF LADING NO.
82468

DATED AT

TERMS OF BILL OF LADING CONTINUED ON REVERSE SIDE.

REV 1851: 7/72

AMERICAN EXPORT ISBRANDTSEN LINES, INC. **MANIFEST CORRECTION**

132

AS BILLED SHIPPER ~~CONSIGNEE~~ MARKS: INTERCONEX INC

PKGS	DESCRIPTION	WEIGHT	MEASURE	RATE	ITEMIZED AMT	TOTAL PREPAID	TOTAL COLLECT
1	Container STC 73 drums CUTTING OIL 8 drums - Phosphoric ACID	38361	1980	80.00/M	3960.00	3960.00	

BASIS FOR CORRECTION: PROJECT Rate APPLICABLE

AS CORRECTED SHIPPER CONSIGNEE MARKS

PKGS	DESCRIPTION	WEIGHT	MEASURE	RATE	ITEMIZED AMT	TOTAL PREPAID	TOTAL COLLECT
	SAME AS ABOVE	38361	1980	71.00/M	3514.50	3514.50	
				ADD TO MANIFEST			
				DEDUCT FROM MANIFEST		(445.50)	( )

FOR ACCOUNTING USE ONLY

ACCT CODE	DR	CR

	MO. / YEAR	ITEM NO.
SAILING DATE	3 73	1
VESSEL: Defiance	VESS VOY: 47 25	SHIPPER #:
LOAD PORT: Phila	PORT CODE: 359	FORWARDER #: 0770
DISCH PORT: PUSAN	PORT CODE: 403	CERT F: Y
ULT PORT:	PORT CODE:	B: 1
BILL OF LADING	B/L NO.: 92468	

BROKER: Francesco Parisi

REFERENCE NO.:

STREET AND NO.:

CITY: NEW YORK

STATE:

DATE	ISSUED BY	OK	OK	OK
5/4/73	SRB			

I CERTIFY THAT THE ADJUSTMENT TO THE MANIFEST AS NOTED ABOVE IS TRUE AND CORRECT.

BY

1 – FREIGHT CASHIER
2 – STEAMER FILE
2 – PORT OF DISCHARGE
CONFERENCE SECTION
CONTROL PORTS
OUTPORTS

1 – DOCUMENTATION
1 – STEVEDORING
1 – BROKERAGE CLERK
1 – ACCOUNTS RECEIVABLE
2 – ACCOUNTING

MANIFEST CORRECTION NO.
359-01239
AMERICAN EXPORT ISBRANDTSEN LINES, INC.

2

Far East Conference

Tariff No. 25 **F. M. C. No. 5**

ORIG./REV.	PAGE
2nd Revised	104
CANCELS	PAGE
1st Revised	104
EFFECTIVE DATE	
May 27, 1970	
CORRECTION NO.	1201
CANCELS CORR. NO.	851

133

From: UNITED STATES ATLANTIC and GULF PORTS.

To: JAPAN, OKINAWA, KOREA, TAIWAN, HONG KONG, PHILIPPINE ISLANDS, VIET NAM, CAMBODIA and LAOS.

RULES AND REGULATIONS

→ **9. OVERCHARGES**

Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

All requests for remeasurements or reweighing at destination must be made in writing to the Conference by the carrier; however, such requests will not be considered if the goods shipped are covered by a Weight/Measurement Agreement, in which case the weights or measurements as shown in the agreement shall govern.

The results of such remeasurements or reweighing at destination are to be submitted to the Conference for such further handling as may be required with the carriers and/or the Cargo Inspecton Bureaus.

Any expenses incurred by the carrier or the Conference in connection with the investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant.

(C) All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after date of shipment. (Not applicable on shipments made in the name of United States Governmental Agencies.)

For purposes of uniformity in handling claims for excess weights or measurements, refunds will only be considered, as follows:

Excess Measurement

Where an error has been made by the dock in calculation of measurement.

Against remeasurement made at port of loading prior to ship's departure.

Against remeasurement made by official measurers named by the Conference at destination.

Excess Weights

Upon submission of Certified Public Weigher's Certificate at port of loading.

Against reweighing by official weighers named by the Conference at destination.

(C) Change

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BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.
Respondents

DOCKET NO. 75-24

MOTION TO DISMISS

Pursuant to Rule 5(m) and 5(d) of the Commission's Rules of Practice and Procedure (46 CFR 502.73 and 502.64) respondent Sea-Land Service, Inc., (Sea-Land) hereby moves the dismissal of the complaint filed by Interconex, Inc. in the above docketed proceeding. Sea-Land further moves that the complaint be dismissed with prejudice as to Sea-Land for the following reasons.

INTRODUCTION

This proceeding was initiated by a complaint served June 5, 1975 in which Colt Industries brought an action against the instant complainant, Interconex, respondents Sea-Land, United States Lines, Inc. (U.S. Lines) and American Export Lines, Inc. (A.E.L.). That complaint has been duly docketed as Colt Industries Operating Corporation v. Interconex, Inc. et. al., Docket No. 75-19, and need not be further elaborated here.

Interconex, Sea-Land, U.S. Lines and A.E.L. have timely replied to the initial complaint. The instant case, as stated in the complaint, is merely an attempt by Interconex to toll the Statute of Limitations on recovery of claims as set forth in Section 22, Shipping Act, 1916, while seeking some indemnification for any real or alleged misstatements of weight or measurement if the ultimate decision in Docket No. 75-19 should go against it.

THE INSTANT COMPLAINT FAILS TO STATE A CAUSE OF ACTION

No where in the complaint does Interconex state any basis for action against Sea-Land. At best, in the WHEREFORE clause on page 3 of the complaint, Interconex urges only that the Commission "hear its charges against respondents". As to just what these charges might be, the complaint is silent.

All complainant alleges is that respondent "*may* be liable to Interconex for all on part of Colt's claim against it, . . ." (emphasis added, complaint page 3).

As such, this complaint provides no tangible issues or charges to which Sea-Land can respond and is, therefore, deficient in that it is totally nebulous and does not state a definite cause of action.

SEA-LAND HAS FULLY PERFORMED ITS CONTRACT OF AFFREIGHTMENT

If in fact, Interconex misstated the weight and measurement of certain shipments, Sea-Land was not a party to that misdescription. The charges assessed were by Interconex as it interpreted its own tariff and in accordance with that tariff. Sea-Land merely transported the cargo in question and did not breach any contract of carriage owed to Interconex or any one else in this matter. As such, Interconex should not be allowed to indemnify itself by virtue of this cross complaint.

WHEREFORE:

Respondent Sea-Land Service, Inc., in view of the foregoing, urges the Commission to dismiss Sea-Land as respondent in this proceeding with prejudice as to subsequent similar action by complainants and that Sea-Land's further participation in this proceeding be discontinued.

Respectfully submitted,

SEA-LAND SERVICE, INC.
P. O. BOX 900
EDISON, NEW JERSEY 08817

BY: ELDERED N. BELL, JR.
DIRECTOR, REGULATORY AFFAIRS

FRANK HILJER, JR.
COMMERCE MANAGER

VERIFICATION

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Eldered N. Bell, Jr., being first duly sworn on oath deposes and says that he is Director of Regulatory Affairs, Sea-Land Service, Inc. and is the person who signed the foregoing answer and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

ELDERED N. BELL, JR.

Subscribed and sworn to before me, a notary public in and for the State of New Jersey, County of Middlesex, this 22nd day of July, A.D. 1975.

DOROTHY VECCHIARELLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 15, 1977

CERTIFICATE OF SERVICE

I certify that I have this day served copy of this motion on all parties of record by sending same properly addressed via first class U.S. mail, postage prepaid.

Dated at Edison, New Jersey this 22nd day of July, 1975.

ELDERED N. BELL, JR.

JUL 23 1975

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket No. 75-24

MOTION TO DISMISS

Pursuant to Rule 5(m) and 5(d) of the Commission's Rules of Practice and Procedure (46 CFR 502.73 and 502.64) Respondent United States Lines, Inc. (USL) hereby moves that the Complaint in the above captioned proceeding be dismissed for the reasons stated below.

INTRODUCTION

By a pleading purporting to be a "Complaint" served July 2, 1975, Interconex, Inc. has stated "On information and belief if Interconex is finally required to pay reparation to Colt [Colt Industries Operating Corp.] under or in consequence of the Colt Complaint in Docket 75-19, the underlying carriers -- respondents herein -- will or may be required to indemnify

Interconex for all or a part of such reparation."

Paragraph 9 of said "Complaint" states that it is filed "in the nature of a cross-claim against co-parties...on the ground that they are or may be liable to Interconex for all or a part of Colt's claim against it "[Interconex]. The prayer for relief requests that the Commission hear Interconex's charges against respondents in Docket 75-24 and that Interconex's "Complaint" be consolidated with the proceedings in Docket No. 75-19.

As demonstrated below this purported Complaint is both procedurally and substantively deficient, unanswerable as a Complaint, and presents nothing to be consolidated with the Colt Complaint proceeding in Docket 75-19.

I. THE COMPLAINT IS PROCEDURALLY DEFICIENT

1.) The Interconex Complaint Has Not Been Executed In Accordance With Rule 8(b) (46 CFR 502.112(b)).

The "Verification" appended as page 5 of the Complaint fails to comply with the provisions of Rule 8(b) which, in the absence of a signature of an attorney, requires a verification by the party to accompany each pleading filed and that:

> "Where the signature is that of an officer or agent (unless, in the case of a corporate party, it is signed by the president or vice-president and attested by the secretary or an assistant secretary under the seal of the corporation) there shall be filed with the Commission an original or certified copy of the power of attorney or other document authorizing the person to sign."

Here Mr. Jon T. Stephens, President of Interconex, Inc. has signed the Complaint and Verification but his signature has not been "attested by the secretary or an assistant secretary under the seal of the corporation" nor is there any public record of a power of attorney or other document having been filed with the Commission as authority for Mr. Stephens to sign the Complaint or Verification.[1]

This defect requires a finding that the Complaint is void ab initio, should not have been accepted for filing and must be dismissed at this time.

2.) The FMC's Rules Of Practice And Procedure Do Not Permit Assertion Of A Contingent Cross-Claim By Way Of A Separate Complaint.

Interconex alleges that its Complaint is in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules. It should first be observed that the FMC Rules of Practice and Procedure do not provide for such co-party cross-claims. Even with regard to the federal practice, 28 USC 13(g) clearly contemplates that such cross-claims by one party against a co-party will be stated in a pleading filed in the original action against such co-parties. Thus, in the analogous case of defendant seeking to assert a cross-claim against a co-defendant, the proper vehicle for asserting such cross-claim would be the answer to the original Complaint and not a separately docketed proceeding. While setting forth a counter-claim against Colt in its Answer to the Complaint in Docket 75-19,[2] Interconex did not include any cross-claim and it may not avoid the consequences of such failure to do so by indirection.

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[1] Although page 4 of the Complaint lists three "Attorneys for the Complainant," none has signed the Complaint and thus there must be compliance with the verification requirements of 46 CFR 502.112

[2] Filed 8 days after this Complaint.

The impermissability of proceeding by way of a separate Complaint is further demonstrated by the fact that Colt has not been named as a party to the Interconex Complaint with the incongruous result that there is no party to Docket 75-24 prepared to come forward with proof of the Colt allegations incorporated into the Interconex Complaint.

Rule 13(g) of the Federal Rules relied upon by Interconex as well as the FMC's Rules of Practice and Procedure, does not permit the assertion of this alleged contingent cross-claim for indemnification as pleaded herein. At this juncture, the Complaint in Docket 75-24 should be dismissed for the procedural defects recited above.

The Complaint in Docket 75-24, if intended to state a separate cause of action by Interconex as shipper against USL as carrier, is premature and procedurally defective. If, on the other hand, Interconex's Complaint is intended only to urge a contingent claim for indemnification, the institution of a separate Complaint proceeding is inappropriate, unwarranted, and not supported by either the FMC's Rules of Practice by analogy to Federal Rule 13(g).[3/] In either case the Complaint in Docket 75-24 should be dismissed.

II. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

1.) The Complaint Does Not Allege A Violation Of The Shipping Act And Does Not Seek Reparations

Neither the text of the Complaint as filed by Interconex nor the underlying Complaint by Colt appended thereto states a cause of action against USL. The deficiencies in the Colt Complaint

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[3/] See also MacMillian v. United Cargo Corp. 11 SRR 1143 (1970).

stem basically from the admitted facts that Interconex, not Colt, was the shipper who tendered the containers to USL and that Interconex (an NVOCC),[4/] not USL, was the carrier vis-a-vis Colt. Because Interconex has incorporated and adopted the Colt Complaint, USL is compelled to attach hereto as Appendix 1 a copy of its Motion to Dismiss the Colt Complaint which further details the failure of Colt to state a cause of action against USL in Docket 75-19.

As to the Interconex Complaint in Docket 75-24, it clearly fails to allege that USL violated any provision of the Shipping Act and seeks only contingent indemnification, not reparations, from USL. The comment that the Interconex Complaint was filed "on the ground that they [USL and the other vessel operators] may be liable to Interconex for all or part of Colt's claim against it..." (Complaint, para. 9 - emphasis added) discloses on its face that the Complaint does not state an integral or independent cause of action against USL. The further assertion that the Complaint was filed "to toll the statute of limitations with respect to Interconex's claim [for Indemnification] against respondents" adds nothing and may not be allowed to accomplish that stated purpose since, unless and until Colt files an independent cause of action against USL alleging a Shipping Act violation arising out of the Shipper/Carrier relationship between Interconex and USL, Section 22 of the Act and Rule 5(c) will not have been satisfied. Here, Interconex's allegation that USL "may be liable to Interconex for all or a part of Colt's claim

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[4/] i.e. a Non-Vessel Operating Common Carrier against [Interconex]" (emphasis added) amounts to nothing more than: "Notification to the Commission that a Complaint may or will be filed for the recovery of reparations -- [an event which] -- will not constitute a filing within the two year period." (46 CFR 502.65).

2.) As A Matter Of Law Interconex Would Not Be Entitled To Seek Reparations From USL.

By way of incorporation of the Colt Complaint, Interconex has adopted for purposes of its Complaint in Docket 75-24 the allegations that Interconex misstated "the cubic measurements and/or calculations of weights of the shipments in question" (Colt Complaint p. 4, para. 8) and that the shipments were made under the Far East Conference Tariff and other applicable tariffs.[5/] In these circumstances alleged and deemed admitted by the Interconex Complaint, a claim for overcharges said to be attributable to such misstatements of cargo weights and measures cannot, as a matter of law, be the basis for a reparations Complaint by shipper Interconex against carrier USL at this late date.

During the time period covered by the Interconex's Complaint (i.e. July 28, 1972 to February 5, 1975) Rule 9 of the Far East Conference Tariff No. 25 (FMC No. 5)[6/] at page 104 required that:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier...."

[5/] Reference to which is an accepted matter for official notice.

[6/] Cancelled by Far East Conference Tariff No. 26 (FMC No. 8), effective March 1, 1975 wherein the identical Rule 9 appears at p. 126.

With respect to containers listed in Appendix A to Co[illegible]s Complaint as moving on USL's vessels from California to Korea, the Pacific Westbound Conference Local Freight Tariff No. 3 (FMC No. 8) was applicable for the period in question up until January 15, 1975 at which time it was cancelled and superceded by Pacific Westbound Conference Local Freight Tariff No. 4 (FMC No. 12). The former addressed such "overcharges" in Rule 53 at page 43 and the latter addressed such "overcharges" in Rule 53 at page 30. Both of these tariffs employ the same language as the Far East Conference Tariff and require claims "based on alleged errors in description, weight and/or measurement" to be presented in writing before the shipment leaves the custody of the carrier.

Language identical to that quoted above and applicable to the shipments involved in this proceeding was recently examined construed by the Commission in Kraft Foods v. Moore McCormack Lines, Inc., FMC Dkt. 73-44, 14 SRR 603 (1974), Petition For Re-Consideration Denied. There the Commission denied reparations for alleged overcharges based upon cargo mismeasurement "because the Complainant failed to comply with tariff Rule 16[7] and therefore [the Commission] need not consider whether Complainant did or did not sustain its burden of proof as to the correct measurement or weight of the shipment." (Id. at p. 605)

The Commission explained that there, as here:

> "Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms,

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[7] The counterpart of Rules 9 and 53 in the conference tariffs involved here.

> rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.***
>
> Applying this mandate to the case before us, it can be seen that Moore McCormack had no alternative here but to comply with the rules of its tariff on file. *Therefore, in order that Kraft Food's claim be considered, it was required to furnish its claim to Moore McCormack prior to the time the shipment left Moore McCormack's custody*. The provisions of Rule 16 above are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or re-measuring be conducted in a certain way and before the shipment at issue leaves the custody of the carrier. *This rule represents a term and condition of the tariff on file to which the carrier has no choice but to adhere scrupulously. Because Kraft Foods did not comply with these terms, reparation here could not be granted*.
>
> This conclusion in no way restricts the right of any person to file a complaint pursuant to the provisions of Section 22 of the Shipping Act, 1916, within two years after the cause of action accrues. However, *unless the shipper submits a claim involving contested weight or measurement prior to the shipment leaving the custody of the carrier (Rule 16), the merit of any such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rates*. In this case, the shipper should have sought re-weighing or re-measuring prior to the shipment leaving the custody of the carrier as required by Rule 16 of the Moore McCormack tariff."
> (*Id.* at 606 - emphasis added)

It is clear from this Commission decision that, as a matter of law, the Interconex Complaint is deficient on its face to the extent that it might be deemed to seek recovery of reparations (rather than indemnification) from USL based on disputed measurements of cargo weight and cube asserted long after the shipments in question have left the custody of USL. This failure to comply with the governing tariff rules concerning the presentation of such overcharge claims is a fatal defect requiring dismissal of the Interconex Complaint against USL.[8]

3.) Two-Year Statute Of Limitations Bars Any Claims For Reparations Or Indemnification As To Shipments Made After July 1, 1973.

In addition to the complete legal bar to seeking reparations (or indemnification) for errors in cargo weight and measure once the cargo has left the custody of the carrier, Interconex is further precluded from seeking reparations with respect to shipments made more than two years from the date of its Complaint under the general provisions of Section 22 of the Shipping Act (46 USC 821) and Rule 5(c) of the Commission's Rules of Practice and Procedure (46 CFR 502.63). As noted above, Interconex has asked only for indemnification and not stated a cause of action or claim for reparations, but to the extent the Interconex filing might be deemed to constitute a Complaint for reparations it must be measured against the requirement that: "Complaints seeking reparation shall be filed within two (2) years after the cause of action accrues." (46 CFR 502.63).

Since Interconex did not file its purported "Complaint" until July 2, 1975 no award (by way of reparation or indemnification) is possible with respect to shipments made on or before July 1, 1973 (i.e. shipments numbered 00001 through 00175 in Appendix A to the Colt Complaint.)

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[8] See also the Commission order in P.P.G. Industries, Inc. v. United States Lines, Inc., served April 8, 1975, 14 SRR 1657.

WHEREFORE, United States Lines, Inc. respectfully requests that the Complaint in this matter be dismissed.

143

Respectfully submitted,

Russell T. Weil

James P. Moore

KIRLIN, CAMPBELL & KEATING

Attorneys for Respondent
United States Lines, Inc.
900 17th Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion have been served upon the parties or where indicated counsel for the parties to this proceeding by first class mail, postage prepaid, this 22nd day of July, 1975.

James P. Moore

DKT 75-24
Appendix 1

RECEIVED
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FEDERAL MARITIME
COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP., on its
own behalf and as agent for the Government
of the Republic of Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC., and
U.S. LINES, INC.,

Respondents.

FMC Docket
No. 75-19

MOTION TO DISMISS

Pursuant to Rule 5(m) and 5(d) of the Commission's Rules of Practice and Procedure (46 CFR 502.73 and 502.64) Respondent United States Lines, Inc. (USL) hereby moves that the complaint in the above captioned proceeding be dismissed with prejudice as to USL for the reasons stated below.

INTRODUCTION

By complaint served June 15, 1973, Colt Industries Operating Corporation (hereinafter COLT) on its own behalf and as agent for the Government of the Republic of Korea has alleged that Interconex, Inc. (hereinafter INTERCONEX, a Non-Vessel Operating Common Carrier (NVOCC), in the course of discharging a transportation contract with COLT, "fraudulently, negligently or by reason of gross negligence and recklessness misstated the cubic measurements and or calculation of weights of the shipments in question, as a consequence of which said Respondent [INTERCONEX] charged, demanded, collected and received from complainant, compensation in excess of that provided for by said respondent's [INTERCONEX's] published tariff."

Appendix A to the Complaint (in two volumes) is alleged to be a summary of ~~279~~ 379 shipments for movement from the United States to Korea tendered to INTERCONEX between July 28, 1972 and February 5, 1975 under an alleged contractual arrangement between COLT and INTERCONEX under which INTERCONEX "assumed towards Complainant... the obligations of a non-vessel operating carrier by water in accordance with the provision of said Respondent's [INTERCONEX's] tariff on file with this Commission."

Contrary to these allegations and without alleging the existence of any relationship between COLT and United States Lines, Inc. (USL) the complaint names USL as a respondent as its interest may appear with reference to Appendix A to the complaint and asserts that USL has received compensation for ocean carriage in excess of that provided for by the conference tariffs involved. Each of the Summary sheets in Appendix A lists "Shipper under

Ocean Carrier B/L" as "INTERCONEX, INC." The alleged summary sheets contained in Appendix A do not set forth "Charges Billed by Ocean Carrier". Instead, the only allegations are made with respect to "Charges Billed by INTERCONEX, INC."

COLT alleges that it and/or its principal, the Government of the Republic of Korea has been damaged by INTERCONEX's misstatement of cargo weights and measurements in an amount estimated at $500,000.00 and seeks reparations from INTERCONEX.

As detailed below, it is clear that neither the text of the Complaint nor Appendix A thereto, read separately or in combination, alleges the facts necessary to state a cause of action against United States Lines, Inc. or otherwise support a claim for reparations in any amount against USL.

I. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST USL

A. There Is No Contract Of Carriage Between COLT And USL Upon Which To Base This Complaint.

Respondent, USL hereby moves for the dismissal of that portion of the Complaint directed against USL. The basis for such dismissal appears in the Complaint itself where, at pages 3 and 4, Complainant describes first the alleged contractual arrangement between itself and Respondent INTERCONEX and then the source of the allegedly misstated cargo weights and measurements.

The allegation that USL was among the vessel operating common carriers who performed the ocean carriage of these shipments for INTERCONEX, as shipper, pursuant to the published rates, rules, terms and conditions of appropriate conference tariffs does not constitute or create a shipper/carrier relationship between Complainant and USL upon which Complainant can seek to recover reparations from USL or otherwise challenge USL's discharge of its common carrier duties to shipper, INTERCONEX.

In MacMillan Co. v. United Cargo Corp., 11 SRR 1143 (1970), a complaint was filed against an NVOCC alleging that respondent was overpaid for the transportation of complainant's goods.

In denying respondent NVOCC's motion to implead the underlying carriers, it was found that:

> "The bills of lading set forth in the complaint were issued by respondent [NVOCC] and the charges made by respondent were pursuant to its [the NVOCC's] tariff on file with the Commission. The contracts of affreightment upon which the complaint is founded are between complainant [shipper] and respondent [NVOCC] and the complaint alleges that the shipments were tendered to respondent [NVOCC] through direct dealings between complainant and respondent [NVOCC]."

In short, disputes between COLT and its chosen NVOCC (INTERCONEX) arising out of INTERCONEX's performance of a contractual arrangement with Complainant are matters which do not and cannot call into question USL's application of its published tariff rates and rules to the cargo data provided by the shipper INTERCONEX.

The allegation contained in paragraph 9 of the Complaint to the effect that, as its interest may appear, USL has received compensation in excess of that provided for by the conference tariffs involved in violation of 46 U.S.C. 817(b) (3) is clearly unsupported by and inconsistent with the other allegations in the Complaint.

Appendix A admits that INTERCONEX, not COLT, was "Shipper Under Ocean Carrier B/L". INTERCONEX, not USL, is alleged to have misstated the weights and measurements of the shipments in question. There is no allegation that the shipments were misdescribed on the bills of lading issued by USL to INTERCONEX, as opposed to the Bills of Lading issued by INTERCONEX to COLT. INTERCONEX, not USL, billed COLT Industries for freight due in accordance with INTERCONEX's own tariff. INTERCONEX, not USL, was paid by Complainant. And, finally, only charges billed by INTERCONEX are listed in Appendix A to the Complaint.

To the extent that COLT prays for reparations to be paid by USL, as its interest may appear, the complaint is deficient on its face for failing to allege that any part of the injury claimed arose out of a breach of transportation contract or other duty owed by USL to COLT. Furthermore, the facts that are alleged clearly amount to an admission that COLT dealt only with Respondent INTERCONEX, a carrier in its own right, and it is only the conduct of, charges by, and payments to INTERCONEX which are alleged as the basis for this complaint. Therefore, the complaint should be dismissed in its entirety as to Respondent USL.

B. The Alleged Violation of Section 18(b) (3) Should Be Dismissed As Contrary To The Facts Alleged In The Complaint.

After reciting the alleged contractual and tariff provisions under which COLT selected and employed Respondent INTERCONEX to act as the carrier for its shipments to Korea and admitting that INTERCONEX was "Shipper Under Ocean Carrier B/L", and that USL applied the published conference rates to shipments tendered by INTERCONEX, the complaint asserts without logical or factual support that USL violated Section 18(b) (3) of the Shipping Act (46 U.S.C. 817(b) (3)).

Not only is there no support for the conclusory allegation in paragraph 9 of the Complaint that USL received compensation in excess of that provided for in the published conference tariffs, but also, the factual allegations in paragraphs 6, 7, and 8 of the Complaint make it clear that Complainant is not asserting that USL did anything but apply the published tariff rates and rules to the cargo data provided. Thus, no possible basis for an 18(b) (3) allegation against USL has been stated in the Complaint.

None of the entries provided in Appendix A to the complaint list the "Charges Billed By Ocean Carrier". Each of the alleged summaries does include the statement that "Ocean Carrier's

Charges Paid By And Borne By: INTERCONEX, INC." No entries are made in the spaces provided for "Ocean Carrier's Charges Paid By INTERCONEX on:" and no entries are made in the spaces provided for "Charges That Should Have Been Billed By Ocean Carrier".

This complete lack of any allegations as to ocean freight billed by USL to "Shipper" INTERCONEX coupled with the admission that USL simply applied the published conference rates to the cargo descriptions provided by INTERCONEX demonstrates that neither the text of the complaint nor Appendix A thereto can support the allegation that, USL violated Section 18(b) (3).

C. As A Matter Of Law, COLT Would Not Be Entitled To Seek Reparations From USL Even If It Were The Shipper.

As noted above, COLT has not stated a cause of action against USL. INTERCONEX, not COLT, was the shipper, but, even if, COLT had been the shipper - an impossibility in view of the contrary allegations that COLT dealt only with the NVOCC INTERCONEX - reparations could not be awarded to COLT (or to INTERCONEX), under existing FMC case law. The alleged overcharges are expressingly said to be attributable to INTERCONEX's misstatement of "the cubic measurements and/or calculations of weights of the shipments in question",[1/] (Complaint p.4,

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[1/] There is no allegation that such misstatements were made or carried over to to USL's Bills of Lading.

paragraph 8) and alleges that the shipments were made under the Far East Conference Tariff and other applicable tariffs.[2]

During the time period covered by the Complaint (i.e. July 28, 1972 to February 5, 1975) Rule 9 of the Far East Conference Tariff No. 25 (FMC No. 5)[3] at page 104 required that:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier...."

With respect to containers listed in Appendix A as moving on USL's vessels from California to Korea, the Pacific Westbound Conference Local Freight Tariff No. 3 (FMC No. 8) was applicable for the period in question up until January 15, 1975 at which time it was cancelled and superceded by Pacific Westbound Conference Local Freight Tariff No. 4 (FMC No. 12). The former addressed "overcharges" in Rule 53 at page 43 and the latter addressed "overcharges" in Rule 53 at page 30. Both of these tariffs employ the same language as the Far East Conference Tariff and require claims "based on alleged errors in description, weight and/or measurement" to be presented in writing before the shipment leaves the custody of the carrier.

Language identical to that quoted above and applicable to the shipments involved in this proceeding was recently examined construed by the Commission in Kraft Foods v. Moore McCormack Lines, Inc., FMC Dkt. 73-44, 14 SRR 603 (1974), Petition For Re-Consideration Denied. There the Commission denied reparations for alleged overcharges based upon cargo mismeasurement "because the Complainant failed to comply with tariff Rule 16[4/] and therefore [the Commission] need not consider whether Complainant did or did not sustain its burden of proof as to the correct measurement or weight of the shipment." (*Id.* at p. 605)

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[2] Reference to which is an accepted matter for official notice.

[3] Cancelled by Far East Conference Tariff No. 26 (FMC No. 8), effective March 1, 1975 wherein the identical Rule 9 appears at p. 126.

The Commission explained that there, as here:

> "Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.***
>
> Applying this mandate to the case before us, it can be seen that Moore McCormack had no alternative here but to comply with the rules of its tariff on file. Therefore, in order that Kraft Food's claim be considered, it was required to furnish its claim to Moore McCormack prior to the time the shipment left Moore McCormack's custody. The provisions of Rule 16 above are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or re-measuring be conducted in a certain way and before the shipment at issue leaves the custody of the carrier. This rule represents a term and condition of the tariff on file to which the carrier has no choice but to adhere scrupulously. Because Kraft Foods did not comply with these terms, reparation here could not be granted.
>
> This conclusion in no way restricts the right of any person to file a complaint pursuant to the provisions of Section 22 of the Shipping Act, 1916, within two years after the cause of action accrues. However, unless the shipper submits a claim involving contested weight or measurement prior to the shipment leaving the custody of the carrier (Rule 16), the merit of any such claim must be governed by the weights and measure-

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[4/] The counterpart of Rules 9 and 53 in the conference tariffs involved here.

> ments shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rates. In this case, the shipper should have sought re-weighing or re-measuring prior to the shipment leaving the custody of the carrier as required by Rule 16 of the Moore McCormack tariff." (*Id.* at 606 - emphasis added)

In view of this Commission decision, which is the controlling law in this case, the Complaint is further deficient on its face insofar as it seeks recovery of reparations based on disputed measurements of cargo weight and cube asserted long after the shipments in question have left the custody of USL.[5/]

Even if COLT had alleged a shipper/carrier relationship with USL rather than employing INTERCONEX, as an NVOCC, its failure to comply with the published tariff rules concerning the presentation of such overcharge claims, would as a matter of law, prevent COLT from seeking reparations from USL. Thus, it is doubly clear that the Complaint should be dismissed as to USL.

II. COMPLAINANTS" ACTION IS UNTIMELY WITH RESPECT TO SHIPMENTS MADE BEFORE JUNE 5, 1973

In addition to the substantive deficiencies apparent on the face of the Complaint and discussed in Section I of this motion, the first one hundred and seventy (170) of the ~~two~~ three hundred and seventy-nine (~~279~~ 379) shipments summarized in

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[5/] See also the Commission order in P.P.G. Industries, Inc. v. United States Lines, Inc., served April 8, 1975, 14 SRR 1657.

Appendix A to the Complaint clearly cannot procedurally suppor a claim for reparation.[6]

In accordance with Section 22 of the Shipping Act of 1916 and Rule 5(c) of the Commission's Rules of Practice and Procedure, the first 170 shipments on which Complainant seek t recover alleged overcharges by way of reparations are untimely and barred by the two-year limitations period. As pertinent Section 22 of the Act (46 U.S.C. 821) provides:

> "The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment... of full reparation..."

and Rule 5(c) (46 C.F.R. 502.63) requires:

> "Complaints seeking reparation shall be filed within two (2) years after the cause of action accrues."

The Complaint and Appendix A thereto, establish, that the container movements summarized under consecutive numbers "00001" through "00170" in Appendix A were "Shipped From Loadi Port" on or before May 25, 1973.

Since this Complaint was not filed with the Commissio until June 4, 1975, the cut-off date for reparations even under an allowable cause of action would be June 4, 1973 and that portion of the Complaint seeking reparations for alleged overcharge on the first 170 shipments listed in Appendix A must be dismissed as barred by the two-year statute of limitations.

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[6] Volume 1 of Appendix A to the Complaint alleges that USL was the Ocean Carrier on the shipments numbered "00001" through "00170" except for shipment number "00069".

WHEREFORE, United States Lines, Inc. respectfully requests that the Complaint against it in this matter be dismissed with prejudice.

Respectfully submitted,

Russel T. Weil

James P. Moore

KIRLIN, CAMPBELL & KEATING
Attorneys for Respondent
United States Lines, Inc.
900 17th Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion have been served upon the parties or where indicated counsel for the parties to this proceeding by first class mail, postage prepaid, this 10th day of July, 1975.

James P. Moore

(S E R V E D)
(JULY 23, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 23, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ORDER DENYING EXTENSION OF TIME TO COMPLAINANT TO OBJECT TO OR ANSWER INTERROGATORIES AND REQUEST FOR DOCUMENTS, AS WELL AS TO RESPOND TO COUNTERCLAIM AND ANSWER MOTIONS TO DISMISS THE COMPLAINT

On July 18, 1975, the complainant served (filed July 21, 1975) a request, specifically with respect to respondent Interconex, Inc., for an extension of time to object to or answer the interrogatories and request for documents, as well as to respond to the counterclaim; as to the other respondents, Colt Industries Operating Corporation seeks an extension of the time to respond to their motions to dismiss. In any event, the extension is sought to and including September 15, 1975. As reasons therefor the complainant states, "In view of summer schedules, and the necessity of obtaining information and preparing further responsive pleadings"; that Interconex has no objection to the request, subject to 3 certain limitations one of which provides that the complainant will not oppose an Interconex request to postpone hearing up to 40 days beyond December 5, 1975; that respondent Sea-Land Service, Inc., and American Export Lines, Inc., agree to the extension to respond to their motions to dismiss, without reservation or condition; that counsel for U. S. Lines, Inc., was not reached, but a copy of the July 18, 1975, letter was served.

A letter dated July 18, 1975 (filed July 21, 1975), signed by attorneys for Interconex, recites, *inter alia,* Interconex's agreement to the extension and acceptance of the 3 certain limitations, including no opposition to a complainant's request to postpone hearing up to 40 days beyond December 5, 1975, if such postponement is reasonably necessary by reason of such extension.

Discussion

Complaint in this proceeding, filed June 4, 1975, was served June 5, 1975. The Commission by Notice served June 12, 1975, has directed that hearing in this matter shall commence on or before December 5, 1975. Upon request of the named respondents and with no objection thereto by the complainant, order was served June 23, 1975, extending the time within which respondents could answer or otherwise plead to July 10, 1975. On July 10, 1975, Sea-Land Service, Inc., filed its answer to the complaint including argument and motion for dismissal; United States Lines, Inc., filed a motion to dismiss; American Export Lines, Inc., filed a motion to dismiss the complaint as to it, or, in the alternative, for summary judgment. To date Interconex has filed only the letter referred to above.

It is patently clear that the motions to dismiss should be acted on promptly to enable these proceedings to move as promptly as possible, which standing alone should be regarded as reason for denying the requested extension. Sea-Land Service, Inc.'s answer has brought it and complainant to issue, and should not be delayed. What the movant means by summer schedules is unclear. The Commission has no summer schedules. Summer schedules is no reason for extension nor is consent of the parties, standing alone, a reason. The complainant as the moving party in these proceedings should have anticipated interrogatories and requests for documents and be ready and eager to provide them rapidly. Any thought of postponing hearing 40 days beyond December 5, 1975, the date by which the Commission has directed hearing to commence should be nipped in the bud and such thought disabused in favor of more expeditiously moving along this matter toward disposition.

Wherefore, upon consideration of the above, it is this 23rd day of July, 1975,

Ordered,

The request for extension of time referred to above, be and hereby is denied.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

S E R V E D
JULY 25, 1975
FEDERAL MARITIME COMMISSION

JUL 2 8 1975

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FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 25, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ORDER OF JULY 23, 1975 DENYING EXTENSION, ETC.
ERRATA

On July 24, 1975, counsel for respondent Interconex, Inc. telephoned and advised the undersigned that the order of July 23, 1975 failed to indicate that Interconex, Inc. had filed an Answer and Counterclaim in this proceeding, and stated on page 3 that Interconex had filed only the letter of July 18, 1975 referred to therein. Apology was made to counsel for the oversight.

The following corrections shall be made in the above referred to July 23, 1975, order:

Page 2, last line, after 2nd July 10, 1975 add: Interconex, Inc. served (filed July 11, 1975) its Answer and Counterclaim (with appendix)

Page 3, line 4, Delete "To date"

Page 3, paragraph beginning - "It is patently" at line 4 of said paragraph, (second sentence) after "Inc.'s" add "and Interconex, Inc.'s" change "it" to "them."

William Beasley Harris

William Beasley Harris
Administrative Law Judge

(S E R V E D)
(JULY 23, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 23, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ORDER DENYING EXTENSION OF TIME TO COMPLAINANT TO OBJECT TO OR ANSWER INTERROGATORIES AND REQUEST FOR DOCUMENTS, AS WELL AS TO RESPOND TO COUNTERCLAIM AND ANSWER MOTIONS TO DISMISS THE COMPLAINT

On July 18, 1975, the complainant served (filed July 21, 1975) a request, specifically with respect to respondent Interconex, Inc., for an extension of time to object to or answer the interrogatories and request for documents, as well as to respond to the counterclaim; as to the other respondents, Colt Industries Operating Corporation seeks an extension of the time to respond to their motions to dismiss. In any event, the extension is sought to and including September 15, 1975. As reasons therefor the complainant states, "In view of summer schedules, and the necessity of obtaining information and preparing further responsive pleadings"; that Interconex has no objection to the request, subject to 3 certain limitations one of which provides that the complainant will not oppose an Interconex request to postpone hearing up to 40 days beyond December 5, 1975; that respondent Sea-Land Service, Inc., and American Export Lines, Inc., agree to the extension to respond to their motions to dismiss, without reservation or condition; that counsel for U. S. Lines, Inc., was not reached, but a copy of the July 18, 1975, letter was served.

A letter dated July 18, 1975 (filed July 21, 1975), signed by attorneys for Interconex, recites, *inter alia,* Interconex's agreement to the extension and acceptance of the 3 certain limitations, including no opposition to a complainant's request to postpone hearing up to 40 days beyond December 5, 1975, if such postponement is reasonably necessary by reason of such extension.

Discussion

Complaint in this proceeding, filed June 4, 1975, was served June 5, 1975. The Commission by Notice served June 12, 1975, has directed that hearing in this matter shall commence on or before December 5, 1975. Upon request of the named respondents and with no objection thereto by the complainant, order was served June 23, 1975, extending the time within which respondents could answer or otherwise plead to July 10, 1975. On July 10, 1975, Sea-Land Service, Inc., filed its answer to the complaint including argument and motion for dismissal; United States Lines, Inc., filed a motion to dismiss; American Export Lines, Inc., filed a motion to dismiss the complaint as to it, or, in the alternative, for summary judgment. To date Interconex has filed only the letter referred to above.

It is patently clear that the motions to dismiss should be acted on promptly to enable these proceedings to move as promptly as possible, which standing alone should be regarded as reason for denying the requested extension. Sea-Land Service, Inc.'s answer has brought it and complainant to issue, and should not be delayed. What the movant means by summer schedules is unclear. The Commission has no summer schedules. Summer schedules is no reason for extension nor is consent of the parties, standing alone, a reason. The complainant as the moving party in these proceedings should have anticipated interrogatories and requests for documents and be ready and eager to provide them rapidly. Any thought of postponing hearing 40 days beyond December 5, 1975, the date by which the Commission has directed hearing to commence should be nipped in the bud and such thought disabused in favor of more expeditiously moving along this matter toward disposition.

Wherefore, upon consideration of the above, it is this 23rd day of July, 1975,

Ordered,

The request for extension of time referred to above, be and hereby is denied.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

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BEFORE THE FEDERAL MARITIME COMMISSION

1975 ... 17 PM 3 03

FEDERAL MARITIME
COMMISSION
OFFICE OF THE SECRETARY

--------------------------------------x

COLT INDUSTRIES OPERATING CORP.
on its own behalf and as agent for
the Government of the Republic of
Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND SERVICE,
INC., AMERICAN EXPORT LINES, INC.
and U.S. LINES, INC.,

Respondents.

--------------------------------------x

FMC Docket
No. 75 - 19

REPLY TO COUNTERCLAIM

Complainant, Colt Industries Operating Corp. ("Colt") on its own behalf and as agent for the Government of the Republic of Korea, for its reply to Interconex, Inc's ("Interconex") counterclaim states as follows:

1. Concerning the allegations in paragraph 19, Colt admits that containers with the cargo referred to in the complaint were delivered to Interconex by warehousemen on behalf of Colt but Colt lacks information or belief sufficient to form an opinion as to whether the containers were sealed. Colt admits that warehousemen on behalf of Colt furnished Interconex with substantial documents and data reflecting the true and accurate weights and measures of the cargo packed in the containers delivered to Interconex and that Interconex at all times could have determined the proper weights and measures but Colt lacks

information and belief sufficient to form an opinion as to what all details of the data supplied were. Colt denies that Interconex had no means of verifying the data furnished by warehousemen concerning the proper weights and measures.

2. Colt denies each and every allegation contained in paragraph 20.

3. Colt denies each and every allegation contained in paragraph 21 except that it lacks information or belief sufficient to form an opinion as to what Interconex's clerks did or did not do.

4. Denies each and every allegation contained in paragraph 22.

5. Denies each and every allegation contained in paragraph 23.

FIRST AFFIRMATIVE DEFENSE

6. There is no provision under the rules or regulations of the Federal Maritime Commission for a counterclaim.

SECOND AFFIRMATIVE DEFENSE

7. Concerning Interconex's counterclaim of $930,053.60, for those Interconex bills of lading issued before June 5, 1973, reparation is barred by the requirement of Section 22 of the

Shipping Act of 1916 that reparation claims must be filed within two years after the cause of action accrued.

THIRD AFFIRMATIVE DEFENSE

8. Colt denies that it is liable to Interconex for $169,406.62 as alleged in paragraphs 14, 22 and 23 of Interconex's counterclaim, but even if true, liability for that amount, or any other amount, should be set off against the more than $500,000 Interconex owes Colt as reparation for overcharges on 379 shipments to Korea as set forth in Colt's complaint.

FOURTH AFFIRMATIVE DEFENSE

9. Interconex's counterclaim fails to state a cause of action.

WHEREFORE Colt Industries Operating Corporation, requests an order dismissing Interconex Inc's counterclaim.

Dated this 1st day of August, 1975.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By ____________________________
Sidney S. Rosdeitcher, Esq.
A Member of the Firm
Attorneys for Complainant
345 Park Avenue
New York, New York 10022

HAIGHT, GARDNER, POOR & HAVENS

By ____________________________
Sanford C. Miller, Esq.
A Member of the Firm
Attorneys for Complainant
1 State Street Plaza
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing via first-class mail, postage prepaid, a copy to each such party.

Dated at New York, New York this 6th day of August, 1975.

HAIGHT, GARDNER, POOR & HAVENS

Sanford C. Miller
A Member of the Firm
Attorneys for Complainant
One State Street Plaza
New York, NY 10004

FMC Docket No. 75-19

BEFORE THE FEDERAL MARITIME
COMMISSION

COLT INDUSTRIES OPERATING CORP.
on its own behalf and as agent
for the Government of the
Republic of Korea,

Complainant,

-against-

INTERCONEX, INC., SEA-LAND
SERVICE, INC., AMERICAN EXPORT
LINES, INC., and U.S. LINES, INC.,

Respondents.

REPLY TO COUNTERCLAIM

Paul, Weiss, Rifkind, Wharton & Garrison

Attorneys for Complainant.

345 PARK AVENUE, NEW YORK, N. Y. 10022
644-8000

All communications should be referred
to Sidney S. Rosdeitcher, Esq.

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket No. 75-24

REPLY OF INTERCONEX, INC. TO MOTION TO DISMISS BY UNITED STATES LINES, INC.

I INTRODUCTION

On June 4, 1975, Colt Industries Operating Corp. filed a complaint in Docket 75-19 seeking reparation against Interconex, Inc. (ICX), as a nonvessel operating common carrier by water (NVOCC), and Sea-Land Service, Inc., American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL), as underlying carriers, with respect to 379 shipments which occurred between July 28, 1972 and February 5, 1975. Colt claimed that ICX had overstated cubic measurements and/or weights on those shipments and, as a result, it and the underlying carriers received compensation in excess of that provided for in their tariffs, contrary to Section 18(b)(3) of the Shipping Act of 1916.

As an NVOCC, ICX acted as a carrier with respect to the shipper, Colt, and as a shipper with respect to the carriers, Sea-Land, AEL and USL. In its Answer to the shipper and Motion to Dismiss the Complaint, ICX raised affirmative defenses and arguments consistent with its role as a carrier in that proceeding: that it had applied cargo measurements and weights which were no greater than those declared by Colt or its agents when they tendered cargo to ICX in sealed containers;[1] that reparation with respect to certain shipments was barred by the two-year limitation in Section 22 of the Shipping Act; and that ICX's tariff rule required that refund claims based upon alleged errors in measurement or weight must be presented to it before the cargo involved left its custody.

In its role as a shipper with respect to the underlying carriers, ICX was forced to adopt the arguments of its shipper, Colt, and file a complaint against those carriers in this proceeding. In basic terms, the ICX complaint alleges that if Colt, as a shipper, prevails in its claim against ICX, as a carrier, the same set of facts and legal theory entitles ICX, as a shipper, to recover from the underlying carriers.

For each shipment, Colt paid ICX the ICX tariff rate based upon the measurement or weight declared by Colt and ICX, in turn, paid the underlying carrier its tariff rate (slightly lower than the ICX tariff rate) based upon the same measurement or weight. In other words, most of the money paid by Colt ended up in the hands of the underlying carriers. If Colt prevails on its claim against it, ICX would be forced to return payments received with respect to all shipments, except those occurring before June 4, 1973, which would be barred by Section 22 of the Shipping Act. ICX's ability to recover the payments passed on to the

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[1] Except for the four instances noted in Appendix A to the ICX Answer.

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underlying carriers is limited by Section 22 to those shipments occurring not more than two years before the date it filed its complaint, even though the same set of facts and legal theory as in the Colt complaint would exist. ICX must simultaneously defend the Colt action and adopt the Colt allegations in an action against the underlying carriers, therefore, so as not to prejudice its right to recover money passed on to the underlying carriers by the running of the Statute of Limitations provision of the Shipping Act.

II REPLIES TO SPECIFIC USL ARGUMENTS

A. The Complaint Is Procedurally Sufficient

1. The ICX Complaint Is Executed In Substantial Compliance With All Relevant Statutes And Regulations.

Section 22 of the Shipping Act provides that any person may file with the Commission a "sworn complaint" setting forth any violation of the Act. The ICX complaint has been verified by its President, Jon Stephens.

Unless USL wishes to challenge the fact that Mr. Stephens is the President of ICX or that he has authority to sign its complaint, the failure to have the complaint attested by the corporate secretary under the seal of the corporation is totally insignificant.

To resolve any question of compliance with the Commission's rules, however, attached to this complaint is a substitute signature page, properly attested and sealed.

2. The Commission's Rules Of Practice And Procedure Allow A Separate Complaint In The Nature Of A Cross-Claim.

USL is correct in its assertion that the Commission's Rules of Practice and Procedure do not explicitly provide for cross-claims against co-parites. ICX, on the other hand, never asserted that the rules so provide. ICX adopted the allegations and arguments raised by Colt in Docket 75-19 and incorporated them by reference in its complaint against the underlying carriers in Docket 75-24. It stated that if the Colt allegations in Docket 75-19are true it will or may be entitled to recover from the underlying carriers. Even though this complaint adopts the allegations of Colt's complaint in Docket 75-19, it is a separate complaint.

In its complaint, ICX noted that it was filed to serve the purpose of a cross-claim against co-parties. Such a cross-claim would be allowed in the original proceeding by Rule 13(g) of the Federal Rules of Civil Procedure, but under the Commission's rules it must be brought as a separate complaint. Since the ICX complaint serves that purpose, and since the same set of facts and legal principles are involved as in Docket 75-19, ICX suggested that the two proceedings be consolidated.

While this complaint is not the usual type of complaint filed with the Commission, it clearly alleges that, if ICX violated the Shipping Act with respect to Colt, USL violated the Act with respect to ICX. As stated by the Supreme Court in State of California v. United States, 320 U.S. 577 (1943), the Commission is "duty-bound to remedy" wrongs under the Shipping Act and "as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing." Id. at 584. It is the duty of the Commission to hear the complaint against USL, not to reject it because it may not resemble exactly other pleadings usually found in the same pigeon-hole.

B. The Complaint States a Cause of Action

1. The Complaint Alleges A Violation Of The Shipping Act.

The ICX complaint incorporates by reference the Colt complaint in Docket 75-19 and, thus, alleges that USL "received compensation for ocean carriage in excess of that provided for by the Far East Conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question, in violation of Section 18 of the Shipping Act of 1916, 46 U.S.C. Section 817(b)(3)." ICX incorporated the Colt complaint by reference, but did not charge any other violations of the Shippi because it intended to charge USL with exactly the same violations charge it — no more, no less.

ICX believes that the term "indemnification" adequately describes the nature of its complaint against USL because it seeks to recover payments made to it. Whether the term "reparation," "indemnification" or "damages" is used, the purpose of the ICX complaint is clear — if the facts alleged by ICX (by way of incorporating Colt's complaint in Docket 75-19 by reference) are true, ICX demands that USL return overpayments to it.

The qualification in the ICX complaint that USL "will or may" be liable to ICX, if Colt prevails in its claim against it, merely reflects the uncertainty as to the exact facts which Colt might prove in order to prevail against ICX.

As stated by Professor Davis, "The key to pleading in the administrative process is nothing more than opportunity to prepare." Davis, Administrative Law Treatise 525 (1958). See also, Douds v. International Longshoreman's Ass'n, 241 F. 2d 278, 283 (2nd Cir. 1957). Moreover, as noted in Kuhn v. Civil Aeronautics Board 183 F. 2d 839, 841-842 (D.C. Cir. 1950). "The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law."

With these standards for judging the adequacy of pleadings in mind, it is not surprising that the Commission has held that:

> "It is well established that a complaint may be dismissed on motion only if clearly without any merit. Dismissal for such insufficiency may not be granted 'unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of a claim.' " Investigation of General Rate Increase in the Domestic Guam Trade, 7 SRR 167 (1960).

The ICX complaint clearly notifies USL of its claim, so that it can prepare its defense. We expect that USL will prepare its defense to ICX's claim in this proceeding, which depends upon ICX's role as a shipper with respect to USL, in much the same way as it will prepare its defense to the claim of the ultimate shipper, Colt, in Docket 75-19.

2. The Same Principles Of Law Must Be Applied To The ICX Claim Against USL And The Colt Claim Against ICX.

ICX takes no position, in this motion, concerning the USL argument that the Kraft[2] rule precludes its claim for reparation "based upon alleged errors in description, weight and/or measurement," because ICX failed to present such claims to USL before the cargo involved left the custody of USL. ICX maintains, however, the Kraft rule can operate to dismiss its complaint, only if that rule operates to dismiss Colt's claim in Docket 75-19 with respect to those Colt shipments covered by the ICX tariff containing an almost identical tariff rule.

3. The Same Rule On The Statute Of Limitations Must Be Applied To The ICX Claim Against USL And The Colt Claim Against ICX.

ICX takes no position, in this motion, on the USL argument that the two-year Statute of Limitations in Section 22 of the Shipping Act precludes

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[2] Kraft Foods v. Moore McCormack Lines, Inc. 14 SRR 603(1974)

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reparation with respect to all shipments which occurred more than two years before the filing of its complaint. It maintains, however, that the ICX claim can be dismissed with respect to shipments which occurred more than two years before it filed its complaint, only if the Colt complaint is likewise dismissed with respect to shipments which occurred more than two years before it filed its complaint in Docket 75-19.

III CONCLUSION

ICX maintains that its complaint meets all procedural requirements of the Commission and that its complaint may be dismissed only if consistent portions of the Colt complaint in Docket 75-19 are likewise dismissed.

Respectfully submitted,

Robert L. McGeorge

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Attorneys for Interconex, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of August, 1975, served the foregoing Reply upon all parties of record to this proceeding by first-class mail, postage prepaid.

Robert L. McGeorge

Robert L. McGeorge

respectfully submitted, INTERCONEX, INC.

by
Jon Thad Stephens, President

In witness whereof, I have affixed my name as Secretary and have caused the corporate seal of INTERCONEX, INC. to be affixed hereto.

Monika Adee, Secretary

Ralph J. Sutcliffe
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

George F. Galland
Robert L. McGeorge
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Tel: 202 333-2200
Attorneys for Complainant

dated June 23, 1975

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket No. 75-24

REPLY OF INTERCONEX, INC. TO MOTION TO DISMISS BY SEA-LAND SERVICE, INC.

I INTRODUCTION

On June 4, 1975, Colt Industries Operating Corp. filed a complaint in Docket 75-19 seeking reparation against Interconex, Inc. (ICX), as a nonvessel operating common carrier by water (NVOCC), and Sea-Land Service, Inc., American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL), as underlying carriers, with respect to 379 shipments which occurred between July 28, 1972 and February 5, 1975. Colt claimed that ICX had overstated cubic measurements and/or weights on those shipments and, as a result, it and the underlying carriers received compensation in excess of that provided for in their tariffs, contrary to Section 18(b)(3) of the Shipping Act of 1916.

As an NVOCC, ICX acted as a carrier with respect to the shipper, Colt, and as a shipper with respect to the carriers, Sea-Land, AEL and USL. In its Answer to the shipper and Motion to Dismiss the Complaint, ICX raised affirmative defenses and arguments consistent with its role as a carrier in that proceeding: that it had applied cargo measurements and weights which were no greater than those declared by Colt or its agents when they tendered cargo to ICX in sealed containers;[1] that reparation with respect to certain shipments was barred by the two-year limitation in Section 22 of the Shipping Act; and that ICX's tariff rule required that refund claims based upon alleged errors in measurement or weight must be presented to it before the cargo involved left its custody.

In its role as a shipper with respect to the underlying carriers, ICX was forced to adopt the arguments of its shipper, Colt, and file a complaint against those carriers in this proceeding. In basic terms, the ICX complaint alleges that if Colt, as a shipper, prevails in its claim against ICX, as a carrier, the same set of facts and legal theory entitles ICX, as a shipper, to recover from the underlying carriers.

For each shipment, Colt paid ICX the ICX tariff rate based upon the measurement or weight declared by Colt and ICX, in turn, paid the underlying carrier its tariff rate (slightly lower than the ICX tariff rate) based upon the same measurement or weight. In other words, most of the money paid by Colt ended up in the hands of the underlying carriers. If Colt prevails on its claim against it, ICX would be forced to return payments received with respect to all shipments, except those occurring before June 4, 1973, which would be barred by Section 22 of the Shipping Act. ICX's ability to recover the payments passed on to the underlying carriers is limited by Section 22 to those shipments occurring not more than two years before the date it filed its complaint, even though the same set of facts and legal theory as in the Colt complaint would exist. ICX must simultaneously defend the Colt action and adopt the Colt allegations in an action against the underlying carriers, therefore, so as not to prejudice its right to recover money passed-on to the underlying carriers by the running of the Statute of Limitations provision of the Shipping Act.

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[1] Except for the four instances noted in Appendix A to the ICX Answer.

II REPLIES TO SPECIFIC SEA-LAND ARGUMENTS

A. The ICX Complaint States A Cause of Action

The ICX complaint incorporates by reference the Colt complaint in Docket 75-19 and, thus, alleges that Sea-Land "received compensation for ocean carriage in excess of that provided for by the Far East Conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question, in violation of Section 18 of the Shipping Act of 1916, 46 U.S.C. Section 817(b)(3)." ICX incorporated the Colt complaint by reference, but did not charge any other violations of the Shipping Act, because it intended to charge Sea-Land with exactly the same violations charged by Colt — no more, no less.

As stated by Professor Davis, "The key to pleading in the administrative process is nothing more than opportunity to prepare." Davis, *Administrative Law Treatise* 525 (1958). See also, *Douds* v. *International Longshoreman's Ass'n*, 241 F. 2d 278, 283 (2nd Cir. 1957). Moreover, as noted in *Kuhn* v. *Civil Aeronautics Board* 183 F. 2d 839, 841-842 (D.C. Cir. 1950). "The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law."

With these standards for judging the adequacy of pleadings in mind, it is not surprising that the Commission has held that:

> "It is well established that a complaint may be dismissed on motion only if clearly without any merit. Dismissal for such insufficiency may not be granted 'unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of a claim.' " Investigation of General Rate Increase in the Domestic Guam Trade, 7 SRR 167 (1960).

The ICX complaint clearly notifies Sea-Land of its claim, so that it can prepare its defense. We expect that Sea-Land will prepare its defense to ICX's claim in this proceeding, which depends upon ICX's role as a shipper with respect to Sea-Land, in much the same way as it will prepare its defense to the claim of the ultimate shipper, Colt, in Docket 75-19.

While this complaint is not the usual type of complaint filed with the Commission, it clearly alleges that, if ICX violated the Shipping Act with respect to Colt, Sea-Land violated the Act with respect to ICX. As stated by the Supreme Court in State of California v. United States, 320 U.S. 577 (1943), the Commission is "duty-bound to remedy" wrongs under the Shipping Act and "as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing." Id. at 584. It is the duty of the Commission to hear the complaint against Sea-Land not to reject it because it may not resemble exactly other pleadings usually found in the same pigeon-hole.

B. Even If Sea-Land Has Fully Performed Its Contract Of Affreightment, ICX Is Not Precluded From Recovering From It

If the allegations of Colt in Docket 75-19, which have been adopted by ICX in this proceeding, are true, ICX received freight charges based upon overstated cargo measurements and/or weights. Those payments, except for the spread between ICX tariff rates and the Sea-Land tariff rates, however, were passed on to Sea-Land.

ICX believes that the evidence will show that, if any measurements and weights were overstated, they were overstated by Colt.[2] ICX and Sea-Land, thus, are in the same position — they assessed freight charges at measurements and weights no greater than as supplied by their shipper and completed the transportation services required of them. Sea-Land should not prevail in its motion to dismiss the complaint of its shipper, ICX, unless ICX prevails in its motion to dismiss the complaint of its shipper, Colt.

III CONCLUSION

ICX maintains that there is no basis for dismissing its complaint.

Respectfully submitted,

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Washington, D. C. 20006
(202) 333-2200

Attorneys for Interconex, Inc.

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[2] With the exception of Colt Claim Nos. 1, 86, 183 and 184.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of August, 1975, served the foregoing Reply upon all parties of record to this proceeding by first-class mail, postage prepaid.

Robert L. McGeorge

Robert L. McGeorge

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket No. 75-24

REPLY OF INTERCONEX, INC. TO MOTION TO DISMISS BY AMERICAN EXPORT LINES, INC.

I INTRODUCTION

On June 4, 1975, Colt Industries Operating Corp. filed a complaint in Docket 75-19 seeking reparation against Interconex, Inc. (ICX), as a nonvessel operating common carrier by water (NVOCC), and Sea-Land Service, Inc., American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL), as underlying carriers, with respect to 379 shipments which occurred between July 28, 1972 and February 5, 1975. Colt claimed that ICX had overstated cubic measurements and/or weights on those shipments and, as a result, it and the underlying carriers received compensation in excess of that provided for in their tariffs, contrary to Section 18(b)(3) of the Shipping Act of 1916.

As an NVOCC, ICX acted as a carrier with respect to the shipper, Colt, and as a shipper with respect to the carriers, Sea-Land, AEL and USL. In its Answer to the shipper and Motion to Dismiss the Complaint, ICX raised affirmative defenses and arguments consistent with its role as a carrier in that proceeding: that it had applied cargo measurements and weights which were no greater than those declared by Colt or its agents when they tendered cargo to ICX in sealed containers;[1] that reparation with respect to certain shipments was barred by the two-year limitation in Section 22 of the Shipping Act; and that ICX's tariff rule required that refund claims based upon alleged errors in measurement or weight must be presented to it before the cargo involved left its custody.

In its role as a shipper with respect to the underlying carriers, ICX was forced to adopt the arguments of its shipper, Colt, and file a complaint against those carriers in this proceeding. In basic terms, the ICX complaint alleges that if Colt, as a shipper, prevails in its claim against ICX, as a carrier, the same set of facts and legal theory entitles ICX, as a shipper, to recover from the underlying carriers.

For each shipment, Colt paid ICX the ICX tariff rate based upon the measurement or weight declared by Colt and ICX, in turn, paid the underlying carrier its tariff rate (slightly lower than the ICX tariff rate) based upon the same measurement or weight. In other words, most of the money paid by Colt ended up in the hands of the underlying carriers. If Colt prevails on its claim against it, ICX would be forced to return payments received with respect to all shipments, except those occurring before June 4, 1973, which would be barred by Section 22 of the Shipping Act. ICX's ability to recover the payments passed on to the underlying carriers is limited by Section 22 to those shipments occurring not more than two years before the date it filed its complaint, even though the same set of facts and legal theory as in the Colt complaint would exist. ICX must simultaneously defend the Colt action and adopt the Colt allegations in an action against the underlying carriers, therefore, so as not to prejudice its right to recover money passed on to the underlying carriers by the running of the Statute of Limitations provision of the Shipping Act.

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[1] Except for the four instances noted in Appendix A to the ICX Answer.

II REPLIES TO SPECIFIC ARGUMENTS OF AEL

A. ICX's Claim Is Procedurally Sufficient And Is Founded On The Allegations Of Colt's Complaint In Docket 75-19

As stated previously, ICX initiated this proceeding by filing a separate complaint, as required by the Commission's Rules of Practice and Procedure. In an effort to put the purpose of the complaint into focus, it analogized to the rules for cross-claims against co-parties under the Federal Rules of Civil Procedure — similar to the way in which AEL characterized its Motion to Dismiss as a Motion for Summary Judgment. The fact that neither summary judgments nor cross-claims are expressly provided for in the Commission's rules does not affect the sufficiency of pleadings authorized by the Commission's rules which are designed to accomplish the same purposes.

As stated by Professor Davis, "The key to pleading in the administrative process is nothing more than opportunity to prepare." Davis, Administrative Law Treatise 525 (1958). See also, Douds v. International Longshoreman's Ass'n, 241 F. 2d 278, 283 (2nd Cir. 1957). Moreover, as noted in Kuhn v. Civil Aeronautics Board 183 F. 2d 839, 841-842 (D.C. Cir. 1950). "The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law."

With these standards for judging the adequacy of pleadings in mind, it is not surprising that the Commission has held that:

> "It is well established that a complaint may be dismissed on motion only if clearly without any merit. Dismissal for such insufficiency may not be granted 'unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of a claim.' " Investigation of General Rate Increase in the Domestic Guam Trade, 7 SRR 167 (1960).

The ICX complaint clearly notifies AEL of its claim, so that it can prepare its defense. We expect that AEL will prepare its defense to ICX's claim in this proceeding, which depends upon ICX's role as a shipper with respect to AEL, in much the same way as it will prepare its defense to the claim of the ultimate shipper, Colt, in Docket 75-19.

B. The Same Rule On The Statute Of Limitations Must Be Applied To The ICX Claim Against AEL And The Colt Claim Against ICX.

ICX takes no position, in this motion, on the AEL argument that the two-year Statute of Limitations in Section 22 of the Shipping Act precludes reparation with respect to all shipments which occurred more than two years before the filing of its complaint. It maintains, however, that the ICX claim can be dismissed with respect to shipments which occurred more than two years before it filed its complaint, only if the Colt complaint is likewise dismissed with respect to shipments which occurred more than two years before it filed its complaint in Docket 75-19.

C. The Same Principles Of Law Must Be Applied To The ICX Claim Against AEL And The Colt Claim Against ICX.

ICX takes no position, in this motion, concerning the AEL argument that the *Kraft*[2] rule precludes its claim for reparation "based upon alleged errors in description, weight and/or measurement," because ICX failed to present such claims to AEL before the cargo involved left the custody of AEL. ICX maintains, however, the *Kraft* rule can operate to dismiss its complaint, only if that rule operates to dismiss Colt's claim in Docket 75-19 with respect to those Colt shipments covered by the ICX tariff containing an almost identical tariff rule.

III CONCLUSION

ICX maintains that its complaint meets all procedural requirements of the Commission and that its complaint may be dismissed only if consistent portions of the Colt complaint in Docket 75-19 are likewise dismissed.

Respectfully submitted,

Robert L. McGeorge

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Attorneys for Interconex, Inc.

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[2] *Kraft Foods* v. *Moore McCormack Lines, Inc.* 14 SRR 603(1974)

CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of August, 1975, served the foregoing Reply upon all parties of record to this proceeding by first-class mail, postage prepaid.

Robert L. McGeorge

Robert L. McGeorge

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FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573

OFFICE OF THE SECRETARY

August 7, 1975

Robert L. McGeorge, Esq.
Galland, Kharasch, Calkins & Brown
Canal Square
1054 Thirty-First St., N. W.
Washington, D. C. 20007

Dear Mr. McGeorge:

Receipt is acknowledged of your replies to motions of Sea-Land, American Export and U. S. Lines to dismiss in Docket 75-24. You are reminded that the Commission's Rules of Practice (46 CFR 502.118) require an original and fifteen copies of such documents to be submitted for use of the Commission. Please submit the additional copies as soon as possible.

Very truly yours,

Francis C. Hurney

Francis C. Hurney
Secretary

cc: Honorable William Beasley Harris

(SERVED)
AUGUST 11, 1975
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 11, 1975

NO. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.

ORDER (1) GRANTING MOTIONS TO DISMISS COMPLAINT AND) DISCONTINUING PROCEEDING

On July 22, 1975, respondents Sea-Land Service, Inc., American Export Lines, Inc., and U. S. Lines, Inc., all served motions for dismissal of the complaint herein. The complainant, Interconex, Inc., has replied to none.

Sea-Land Service, Inc.'s motion filed July 23, 1975, states *inter alia,* that (a) the complaint fails to state a cause of action in that all that complainant alleges is that respondent may be liable to Interconex, Inc. for all or part of Colt Industries Operating Corporation's claim against Interconex, Inc., in Docket No. 75-19, and as such the complaint provides no tangible issues or charges to which Sea-Land Service, Inc., can respond; (b) Sea-Land merely transported the cargo in question and did not breach any contract of carriages owed to Interconex, Inc. or any one else in this matter. Sea-Land Service, Inc. asks that the complaint as to it be dismissed with prejudice.

American Export Lines, Inc.'s motion, filed July 22, 1975, states, *inter alia* that (1) the claim is procedurally deficient and factually unfounded, because it is vague, speculative, conjectural; that it fails to allege any breach of AEL's transportation contract or any other duty owed by AEL to Interconex, and (2) that Interconex's claim is time barred in that the shipment left Philadelphia on April 2, 1973 and was discharged in Pusan on May 4, 1973, and the complaint was filed more than two (2) years later; and (3) the claim is barred by the doctrine of *Kraft Foods v. Moore-McCormack Lines, Inc.*, 14 SRR 603 (FMC, 1974).

U. S. Lines' motion, filed July 22, 1975, states, *inter alia* that (1) the complaint is procedurally deficient in that the verification has not been executed in accordance with Rule 8 (b), 46 CFR 502.112(b), in that there is no public record of a power of attorney or other document having been filed with the Commission as authority for the signer of its complaint to sign it, and (2) the FMC's Rules of Practice and Procedure do not permit assertion of a contingent cross-claim by way of separate complaint, and (3) the complaint fails to state a cause of action, fails to comply with tariff rules similar to *Kraft (supra)* and is time barred by two (2) year State of Limitations.

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DISCUSSION

Interconex, Inc., along with the movants, is a respondent in Docket No. 75-19, *Colt Industries Operating Corp. v. Interconex, Inc., et al.* in which complaint was served June 5, 1975. That complaint and its exhibits Interconex, Inc. asked to be incorporated herein by reference and stated that the complaint was filed in the nature of a cross-claim against co-parties as authorized by Rule 13g of the Federal Rules of Civil Procedure and to toll the Statute of Limitations with respect to Interconex's claim against the respondents.

Upon review of the record herein, and consideration of the above motions to which no objections have been filed, it is found and concluded that the above motions appear to be well-founded and should be granted. Wherefore, it is this 11th day of August, 1975,

Ordered,

(A) The motions of Sea-Land Service, Inc., American Export Lines, Inc. and U. S. Lines, Inc., respectively to dismiss the complaint as to each of them, be and hereby is granted

(B) This proceeding is discontinued.

William Beasley Harris
William Beasley Harris
Administrative Law Judge

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1975 AUG 13 AM 9 39
FEDERAL MARITIME
COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL MARITIME COMMISSION

- x

COLT INDUSTRIES OPERATING CORP., On its own behalf and as agent for the Government of the Republic of Korea, :

Complainant, :

- against - : FMC Docket No. 75-19

INTERCONEX, INC., SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC., and U.S. LINES, INC., :

Respondents. :

- x

REPLY OF COMPLAINANT COLT INDUSTRIES OPERATING CORP., ON ITS OWN BEHALF AND AS AGENT FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA, TO THE MOTIONS OF SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC. AND UNITED STATES LINES, INC. TO DISMISS THE COMPLAINT.

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SANFORD C. MILLER, ESQ.,

Of Counsel

BEFORE THE

FEDERAL MARITIME COMMISSION

- x

COLT INDUSTRIES OPERATING CORP., on its
own behalf and as agent for the Government
of the Republic of Korea,

Complainant,

- against -

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., and
U.S. LINES, INC.,

Respondents.

- x

FMC Docket
No. 75-19

REPLY OF COMPLAINANT COLT INDUSTRIES OPERATING CORP., ON ITS OWN BEHALF AND AS AGENT FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA, TO THE MOTIONS OF SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC. AND UNITED STATES LINES, INC. TO DISMISS THE COMPLAINT.

Preliminary Statement

Colt Industries Operating Corp. ("Colt") files this memorandum on its own behalf and as agent for the Republic of Korea in opposition to the motions to dismiss the complaint made by each of the respondent ocean carriers.

This is a proceeding under Section 22 of the Shipping Act of 1916, 46 U.S.C. § 821, in which Colt seeks to recover reparations on behalf of its principal, the Republic of Korea, from Respondent Ocean Carriers and Interconex, Inc., a non-vessel operating common carrier (NVOCC). Interconex arranged for the carriage of goods by the ocean carriers on behalf of Colt which was acting as agent for the Republic of Korea. The reparations are sought for charges made by both the ocean carriers and Interconex substantially in excess of the amount permitted by the tariffs which each of them filed with the Federal Maritime Commission ("FMC").

The complaint, which must be taken as true on this motion, alleges that the ocean carriers and Interconex were unjustly enriched at the expense of the Republic of Korea in an amount exceeding $500,000 -- and that this unjust benefit appears to have been reaped through the presentation by Interconex of false invoices reflecting either fraud or gross negligence. Further details of these extraordinary transactions -- involving arbitrary and false representations with respect to 379 separate shipments -- are set out in the accompanying affidavit of a Colt employee, Anthony Sarkis.

One can scarcely imagine a situation which more urgently requires the intervention of the Federal Maritime Commission. We seek here the enforcement of the Shipping Act of 1916 to protect the interests of a foreign government and to assure that government that it will be able to rely on the integrity of American carriers, freight forwarders and NVOCCs regulated by the

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Federal Maritime Commission. According to information given Colt by Interconex the ocean carriers were the principal beneficiaries of the unjust and excessive overcharges. Yet each of the ocean carriers makes motions to dismiss the complaint on the basis of technical objections which on inspection turn out to have no merit whatsoever. Among other things the motions assert that Colt as agent for the Republic of Korea is powerless to take any steps on behalf of its principal to protect its interests in these proceedings; that conceptions of privity of contract should permit the shipping lines to retain substantial amounts of money which they obtained at the expense of Colt's principal and to which they clearly are not entitled; and that the strong policies of the Shipping Act be set aside because the claims are allegedly time barred, even though the massive overcharges were concealed from Colt through the presentation of false invoices.

This memorandum is addressed to each of the grounds alleged by the ocean carriers and demonstrates that the motions are without basis and must be denied so that this matter can proceed to a determination of the liability of all those who have unjustly benefited at the Republic of Korea's expense.

The Ocean Carriers' Motions

The three ocean carrier respondents -- American Export Lines, Inc., U.S. Lines, Inc. and Sea-Land Service, Inc., each filed separate motions to dismiss. However, all or some of the grounds alleged in any one of the carriers' motions are also repeated in the motions of the others. Colt replies to all three motions in this brief. The grounds for dismissal asserted by the carriers are as follows:

1. That Colt has no standing to assert the claim for overcharges because the contract of carriage was only between Interconex and the ocean carrier, and not between Colt and the ocean carrier. This argument appears to be a claim of lack of privity of contract between Colt and the ocean carrier. This argument is made by each of the three respondent ocean carriers.

2. That Colt fails to allege a violation of the Shipping Act, presumably on the theory that excess overcharges resulting from a false statement of the weights or measurements of the cargo are not a departure from the applicable tariff rates -- even though the tariffs were applied to services the carriers never performed. This argument is made only by U.S. Lines, Inc.

3. That a portion of Colt's claim is time-barred by the two-year statute of limitations set out in §22 of the Shipping Act. This argument is made by American Export Lines, and U.S. Lines, Inc. only.

4. That Colt's claim is time-barred by an application of Rule 9 of the Far East Conference Tariff

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which requires that claims for erroneous weights and measurements be asserted before the cargo leaves the custody of the carrier. This argument is made by American Export Lines, Inc. and U.S. Lines, Inc. only and is predicated on the so-called Kraft Foods doctrine.

Summary of Colt's Response to the Motion

In assessing each of the motions made by the ocean carriers, we submit that the Administrative Law Judge should bear in mind the central facts asserted here:

Colt is alleging that the ocean carriers received an enormous windfall at the expense of Colt's principal, the Republic of Korea, in the form of excess overcharges which resulted from the presentation of false invoices by Interconex, and that based on the facts now known to Colt the ocean carriers were the principal beneficiaries of this fraud or of such gross and reckless disregard for the truth that is tantamount to fraud. Accordingly, Colt is acting here as an agent to protect the interests of the Republic of Korea against the consequences of wrongdoing which has resulted in the receipt by carriers regulated under the Shipping Act of substantial payments to which they are not entitled.

It must also be emphasized that these motions seek to dismiss the complaint -- whose allegations must be taken as true for purposes of the motions -- before any discovery and without any inquiry into the facts.

Colt on the other hand is not now asking that the facts be adjudicated in its favor, but only that it and the Federal Maritime Commission be allowed to determine all the facts in a full proceeding, which should go forward without further delay.

None of the four grounds for dismissal urged by the ocean carriers has any merit.

First, Colt's claim against the ocean carriers cannot be disposed of on the ground of a lack of privity of contract. The ocean carriers have reaped an unjust benefit at the expense of Colt's principal, the Republic of Korea. Well-established principles of law and equity show that the ocean carriers cannot retain their unjust benefit merely because they dealt with an intermediary. Colt has standing to regain the unjust benefit from the ocean carriers, either (1) as agent for the Republic of Korea, which was disclosed on the bills of lading as the consignee and hence a party to the contracts of carriage; or (2) as the partially disclosed principal of Interconex, with whom the ocean carriers concededly dealt and who they must have known to be acting as an agent. We set forth the pertinent authorities in support of Colt's standing to sue claim under Point I of this brief.

Second, the procurement of excessive charges by false over-statements of a shipment's weights and measures is no different than the application of an improper tariff to an accurate statement of the weights and measures. In either case, the ocean carrier receives payment in excess of that to which it is entitled under its tariff, and in violation of the Shipping Act. Any other view would vitiate the protections afforded by the Act. The principles in support of this proposition are set out in Point II below.

Third, it is well established that the statute of limitations does not commence to run where the facts underlying the cause of action have been concealed through fraud or acts tantamount to fraud. This is particularly true where as here the claimant seeks to enforce an important regulatory policy of the United States. It matters not whether Interconex or the ocean carriers were the perpetrators of the acts in question. The basic principle is that persons who are entitled to the protection of the Shipping Act cannot be time-barred on claims arising out of facts which have been concealed from them by fraud. The authorities supporting this position are set out in Point III.

Finally, the Kraft Foods case was never intended to apply to circumstances such as those involved here, where there are allegations that a massive fraud, or gross and reckless negligence, prevented the shipper or its representatives, or the consignee, from discovering the facts giving rise to the claim until only long after the cargo left the custody of the carrier. If the carriers assert that the conference Rule applies even in the face of such fraud or conduct, the Tariff Rule would be unreasonable and at variance with the policies of the Shipping Act. Thus, even if the Commission's decision in Kraft was rightly decided -- and Colt contends that it was not -- that case bears no resemblance to the facts of the present case.

ARGUMENT

I. COLT IS ENTITLED TO CLAIM AGAINST THE OCEAN CARRIERS, ON ITS OWN BEHALF, AND ALSO ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF KOREA

The allegations of the complaint must be taken as true. On that basis, the ocean carriers, as the result of inaccurate weights and measurements reflected in false and inaccurate bills of lading and invoices presented by Interconex, have received substantial payments to which they are not entitled. Moreover, the burden of these overpayments fell upon Colt's principal, the Republic of Korea. Yet, the ocean carriers claim that they may retain these unjust benefits because Colt, whose name does not appear on the bills of lading, has no standing to act to protect the Republic of Korea. At the same time, at least one of the ocean carriers (Sea-Land) moves to dismiss the claim over of Interconex (Docket No. 75-24), with whom it concededly dealt on the ground that Interconex is the wrongdoer and should not be allowed to recover anything from the ocean carrier. In sum, the ocean carriers maintain that they are entitled to keep their windfall because no one has standing to compel them to disgorge it. This position is patently untenable. The Republic of Korea or, in this case, Colt acting on its behalf are the only appropriate parties to force both Interconex and the ocean carriers to return the funds to which they are not entitled. Any other view would render the Shipping Act effectively unenforceable against the ocean carriers, since Interconex, the principal alleged wrongdoer, all of whose overcharges were passed on to the Republic of Korea as Colt's principal, can hardly be expected to take any initiative in righting its own wrongs. It should be left to a full hearing to establish how payment of the reparations should be allocated between Interconex and the ocean carriers.

On the most rudimentary principles of equity, the ocean carriers cannot be unjustly enriched merely because they obtained such enrichment at the expense of someone with whom they dealt only through an intermediary. This very case is covered by Section 123 of the Restatement of Restitution as follows:

> "A person who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account to the other for the direct product of the subject matter and the value of the use to him, if any, and

in addition, to:

> (a) return the subject matter in specie, if he has it;
> (b) pay its value to him, if he has non-tortiously consumed it in beneficial use;
> (c) pay its value or what he received therefor at his election, if he has disposed of it."

Comment a to this section contains an illustration of the rule which virtually describes the present case:

> "Another situation illustrating the rule stated in this Section arises where an excessive amount of property has been transferred and the mistake is perpetuated in a subsequent transfer so that the second transferee gets something more than he or the original parties intended, in which case he is under the same duty of restitution as was the original transferee."

Moreover, Colt as agent for the Republic of Korea -- which ultimately bore the cost of the overcharge -- is clearly a proper party to force the ocean carriers to make restitution of those amounts by which they were unjustly enriched. We start with the familiar principle of maritime law that the consignee under an ocean bill of lading is a party to the contract of carriage represented by the bill of lading. Thus in The Speybank, 28 F.2d 436, 437 (D.Md., 1928), the Court, upholding a consignee's standing to claim for cargo damage, stated:

> "It is well settled in admiralty that the consignee of goods is entitled to sue in his own name. The Vaughan, 14 Wall. 258, 20 L.Ed. 807."

In the present case, the Government of Korea was the consignee of all the shipments referred to in the complaint (see complaint, at paragraphs 6 and 7). The evidence on the trial will show that officials of the Government of Korea were identified as the consignees on the ocean bills of lading (see, for example, the ocean bill of lading on the S.S. DEFIANCE, attached as an exhibit to the motion to dismiss filed on behalf of respondent American Export Lines, Inc.). All the respondent Ocean Carriers knew that the Government of South Korea was the consignee, and accordingly a party to the contracts of carriage represented by the bills of lading. The complaint in this case specifically alleges (paragraph 10) that the Government of the Republic of Korea has been damaged "by reason of excessive charges for ocean freight."

This allegation brings the Republic of Korea squarely within the provisions of Section 22 of the Shipping Act itself. Section 22, 46 U.S.C. § 821, provides:

> "Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby." (emphasis added)

The complaint clearly alleges violations of the Act by the respondent ocean carriers, with resulting injury to Korea. These are sufficient allegations of "injury in fact" to entitle the Republic of Korea to claim under the broad provisions of Section 22. Cf. United States v. Scrap, 412 U.S. 669, 683-690 (1973).

It is equally well established under the maritime law that Colt has standing to claim as agent for its absent principal, the Republic of Korea. In Fisser v. International Bank, 164 F. Supp. 826 (S.D.N.Y , 1958), the Court in its discussion refers to the:

> ". . . well-recognized practice in the admiralty that the agent of an absent owner of cargo may assert in his own name his principal's right of action."

In Martran Steamship Company, Inc. v. Aegean Tankers Limited, 170 F. Supp. 477 (S.D.N.Y., 1959), the Court, rejecting a motion by the respondent to dismiss a maritime claim, stated:

> "As to respondent's contention that the libelant is not a real party in interest, it is clear that it is not essential that the libelant be the owner of the cause of action, so long as he is duly qualified to represent the real party in interest." 170 F. Supp. at p. 478

Even where the agent's initial act in commencing suit was unauthorized, the principal may ratify such action during the course of the proceeding. In Aunt Jemima Mills Co. v. Lloyd Royal Belge, 34 F.2d 120, 122 (2d Cir., 1929), the Court of Appeals said:

> "Undoubtedly an agent's unauthorized act in filing a liable for absent owners may be subsequently ratified by them, and proof of such ratification, made before the decree is entered, will be sufficient."

Colt's status as agent for the Republic of Korea is alleged in the complaint, as well as in Mr. Sarkis' affidavit, and if necessary can be further demonstrated in the proof on the trial. For purposes of this motion, however the allegation of agency must be taken as true.

If Colt's status as agent for Korea is challenged by any respondent, that issue must be resolved at the trial. It cannot be adjudicated on a motion to dismiss the complaint. In the *Fisser* case *supra*, the Court said in rejecting a motion to dismiss:

> "Of course, both the agency, and the principals' consent to and authority for this suit, must be proven at the trial. *National Interocean Corp.* v. *Emmons Coal Mining Corp.*, D.C.E.D.Pa. 1921, 270 F. 997, 1000." 164 F. Supp. at 827.

In similar fashion, the rules of this Commission provide for the appearance of a party by a "duly qualified representative", Rule 2(a), 46 C.F.R. Section 502.21, although (as in the cases just cited) an individual acting in such representative capacity "may be required to show his authority to act in such capacity", Rule 2(b), 46 C.F.R. Section 502.22. Such proof of authority will be forthcoming upon the trial; this is not the sort of issue which can appropriately be resolved on a motion to dismiss.

Here, Colt as agent for Korea is under a duty to act diligently to protect that government's interests. It must be remembered that Korea is a distant country, with a different language and a different system of law -- and that governmental review of potential claims is a time consuming process. In the meantime, the Respondents are already maintaining that all or portions of the claim are time barred. It was

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thus imperative that Colt act immediately to protect Korea's claims -- and the law fully supports its right and duty as agent to do so. See also F.R.Civ.P. 17.

Finally, Colt has standing to assert the claim against the ocean carriers as the partially disclosed principal of Interconex, with which the ocean carriers concede they dealt. Interconex was acting on Colt's behalf and was functioning in the role of Colt's agent. Certainly the ocean carriers must have recognized on the basis of their past experience that Interconex was only an intermediary -- and they could not have believed that Interconex was acting on its own behalf.

As alleged in Paragraph 6 of the complaint, and as the evidence on the trial will demonstrate, Interconex acted as an independent ocean freight forwarder, in connection with the shipments in question, from November of 1971 until July of 1972, when it changed its status to that of an NVOCC. The duties and obligations which a freight forwarder bears to the shipper, as his principal, are aptly summarized in Ullman, The Ocean Freight Forwarder, The Exporter and The Law, (1967), at page 5:

> "In rendering his service the forwarder acts as agent of the shipper, U.S. v. American Union Transport, Inc., et al., 327 U.S. 437, 443. The shipper does not have the right to control the means and manner by which the forwarder performs his tasks, however. While the shipper may tell the forwarder what shall be done, he does not say how it shall be done or who shall do it. The forwarder is, therefore, an independent contractor with respect to his relationship with the shipper. Standard Oil Co. v. Anderson, 212 U.S. 212; In re Electrolux Corp., 262 App. Div. 642 (N.Y.).

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> As agent for the shipper in the broad sense, the forwarder acts in a fiduciary capacity on matters entrusted to him by his principal. Application of L. H. Graves, 8 F.M.C. 109. The forwarder must exercise the utmost good faith toward his customer and act according to the highest and truest moral principles. Elco Shoe Mfrs. v. Sisk, 260 N.Y. 100. The forwarder may not profit at his principal's expense. Polley v. Daniels, 238 App. Div. 181 (N.Y.)"

This agency relationship continues, we submit, even though, following the commencement of the course of business in question, the freight forwarder takes upon itself the status of an NVOCC. While the functions of an NVOCC differ somewhat from that of freight forwarder, its function as an intermediary acting on behalf of someone else is basically the same and it in fact performs many of the very same services performed by the freight forwarder.

Consequently, under familiar principles of agency, the ocean carriers must respond to the party who retains the services of an NVOCC, if by reason of the NVOCC's fraudulent act or negligence the ocean carriers have been unjustly enriched, in violation of the statute. Surely the respondent ocean carriers in this case knew that respondent Interconex, a registered NVOCC, was not the owner or consignee of the goods that were being carried. At the very least, Colt stood in the position of a partially disclosed principal; the proof on the trial may very well show that the respondent ocean carriers had actual knowledge of the identity of Colt as Interconex's principal. The respondent ocean carriers are liable to Colt in either event. The general rule is stated in the Restatement of the Law of Agency, 2d, at §292.

> "The other party to a contract made by an agent for a disclosed or partially disclosed

> principal, acting within his authority, apparent authority or other agency power, is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract."

Here, the claim is one for reparations -- and is essentially founded on principles of equity found in the law of restitution -- and accordingly rigid notions of privity do not apply. But, as shown, even under the conception of privity of contract relied upon by the ocean carriers, Colt as the representative of the Republic of Korea and as principal in the shipment of goods on the ocean carriers vessels arranged through Interconex is an appropriate party to assert the claims and protect the Republic of Korea.

The ocean carriers rest their inequitable position on a single authority: *MacMillan Co.* v. *United Cargo Corp.*, 11 SRR 1143 (1970). Unfortunately they quote only a portion of the opinion -- and omit that portion which demonstrates that it has no application here. While it is true that, in that case, the respondent NVOCC's motion to implead underlying ocean carriers was denied, the present respondents omit the concluding paragraph of the Presiding Examiner's opinion. That last paragraph reads as follows:

> "The issues raised by the complaint being limited to the relationship between complainant and respondent *and no violation of the Shipping Act, 1916, by the underlying carriers having been alleged*, the motion to implead underlying carriers is denied." (emphasis added)

In the present case, the complaint (paragraph 9) specifically alleges that the ocean carriers received compensation in excess of that provided for by the tariff and other controlling rates, in violation of Section 18 of the Shipping Act of 1916. The MacMillan decision is accordingly distinguishable in this vital respect, and has no relevance to the present case.

We also note that respondent Interconex, Inc., the NVOCC in this case, has filed a separate complaint (Docket No. 75-24) against the three respondents ocean carriers in the captioned proceeding. That separate action will presumably be consolidated with the captioned proceeding for trial. In these circumstances, it is appropriate to resolve the rights and obligations of all parties on a full trial, rather than on a motion to dismiss.

II. THE COMPLAINT ALLEGES VIOLATIONS OF SECTION 18(b)(3)OF THE SHIPPING ACT BY EACH OF THE OCEAN CARRIERS

Respondent U.S. Lines, Inc. argues that the complaint fails to allege any violation of the Shipping Act. But the complaint clearly alleges that each of the ocean carriers received compensation for the carriage of goods shipped by Colt to the Republic of Korea, and that the compensation received exceeded the amount to which the carriers were entitled under their tariffs. The precise amount of the overcharges has not yet been determined but it now appears clear that on each transaction arranged by Interconex the amounts charged by the ocean carriers were computed on the basis of weights or measures which were false

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and inaccurate -- with the result that substantial overcharges were imposed. Determination of the precise amount of the overcharges must await the outcome of further investigation and discovery, but that surely does not justify the dismissal of the complaint.

Nor can it be argued that the carriers were in compliance with Section 18(b)(3) because they applied the "correct" rates but they overcharged only because the weights and measures to which these rates were applied were false. If the allegations of the complaint are true, it will inevitably follow that the ocean carriers (who received revenues based upon such erroneous measurements or miscalculations) received "a greater . . . or different compensation for the transportation of property . . . than the rates and charges which are specified in its tariffs . . . "in violation of Section 18(b)(3). They applied their tariffs for services which they in fact never performed. The underlying events giving rise to this complaint may be relatively complex; but the complaint is, in essence, a request for reparations as the result of freight overcharges, a not unusual proceeding before this Commission.

The Shipping Act would be vitiated if a carrier could avoid Section 18(b)(3) by simply claiming that the rates it applied were correct, even though it receives excessive payments through the misstatement of the weight or measures to which the rates are applied.

It is, therefore, not surprising that overcharges resulting from mismeasurements have consistently been made the subject of reparations proceedings under Section 22. See, e.g., Trane Co. v. Concordia Line, 11 SRR 352 (1970).

This Commission and the Interstate Commerce Commission have held that the only lawful charges that may be collected and retained by the carrier are those determined on the basis of the tariff charges for the services actually performed. In Western Publishing Co., Inc. v. Hapag Lloyd A.G. 13 SRR 16 (1972) the Federal Maritime Commission held that:

> "Furthermore, we have recently taken the approach that the description of the bill of lading should not be the single controlling factor in cases of this nature. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description."

To the same effect see also Union Carbide Inter-America v. Norton Line, 14 F.M.C. 262, 264 (1971).

In Janice, Inc. v. Acme Fast Freight, Inc. 302 I.C.C. 596, 597 (1958), the Interstate Commerce Commission held that:

> "It is well settled that there is a duty upon the shipper to pay and the carrier to collect charges on the articles actually shipped, regardless of their description in shipping papers." (emphasis supplied)

It is correct, as respondent U.S. Lines points out at pages 6-7 of its brief, that Appendix A to the complaint is at present incomplete in several respects, as, for example, the amounts paid by Interconex to the ocean carriers. As the evidence on the trial will show, Colt's position was made difficult by the repeated failure of Interconex, in breach of its contract with Colt, to furnish Colt with full documentation in respect of each shipment, including copies of the ocean bills of lading. The full particulars will have to be developed during discovery and trial procedures, and Colt has undertaken in its complaint (paragraph 8) to amend and supplement its Appendix A when in a position to do so.

It is quite clear that the case is not subject to dismissal on motion at this early stage of the proceedings.

III. THE TWO-YEAR LIMITATIONS PROVIDED IN SECTION 22 OF THE SHIPPING ACT AND RULE 5(c) OF THE COMMISSION'S RULES WAS TOLLED BY THE FRAUDULENT PRACTICES ALLEGED IN THE COMPLAINT.

U.S. Lines and American Export Lines argue that any shipments prior to June 4, 1973 could not be made the subject of a claim for reparations, in view of the requirement in Section 22 of the Act, 46 U.S.C. Section 821, that the claim for reparations be filed "within two years after the cause of action accrued . . ." Rule 5(c), 46 C.F.R. Section 502.63, is to the same effect. Accordingly, they argue that a portion of Colt's claims are time-barred by these limitations provisions.

The complaint alleges (paragraph 8) that respondent Interconex fraudulently misstated the cubic surements and/or calculation of weights of the shipments in question, with the result that illegal overcharges were collected. It is alleged alternatively that the false statements resulted from gross negligence -- here, such a reckless disregard for the facts as to amount to fraud.

It is a generally recognized rule of law that, where fraud is practiced, statutes of limitation are tolled. In Holmberg v. Armbrecht, 327 U.S. 392, 396-7 (1946), the Supreme Court stated:

> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' Bailey v. Glover, 21 Wall. 342, 348; and see Exploration Co. v. United States, 247 U.S. 435; Sherwood v. Sutton, 5 Mason 143.
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> This equitable doctrine is read into every federal statute of limitation." (emphasis added)

In 2 Moore's Federal Pratcice at p. 762, it is said:

> "Where the federal doctrine of laches or a federal statute of limitations is applicable it is clear that the federal fraudulent concealment rule (the time period does not begin to run until the defrauded party has or should have had knowledge of the facts) applies."

In Winkler-Koch Engineering Co. v. Universal Oil Products Company, 100 F. Supp. 15, 29 (S.D.N.Y., 1951), the Court held:

> "Under federal law when a federal cause of action involves a fraud the running of a federal statute of limitations is suspended until discovery of the fraud, despite the failure of the statute to contain such a qualifying provision. This equitable doctrine or mitigating construction is read into every federal statute of limitations."

We submit that this salutary and equitable doctrine tolls the two-year statute of limitations in reparations cases not only with respect to respondent Interconex, but with respect to the respondent ocean carriers as well. The protection afforded by this doctrine does not turn on whether some of the recipients of the overcharges were not themselves participants in the fraud. The doctrine is designed to protect claimants under a federal regulatory scheme who might be deprived of their claims if the statute of limitations were to run during a period in which the facts underlying the claim were fraudulently concealed from it. Thus, even if it should be established that the ocean carriers neither participated in nor knew of Interconex's fraudulent acts, they should not be able to profit by those acts at the expense of a true claimant which, because of fraud, failed to assert its claims earlier. Colt did not begin to suspect the fraud until late in 1974 and did not begin to become aware of its scope and nature until February or March, 1975. (See Sarkis Affidavit). All of the facts pertaining to perpetration of the fraud and Colt's discovery of it are issues for trial. There is certainly no basis for applying the two year statute of limitations to bar any claims at this stage of the proceedi

IV. RULE 9 OF THE FAR EAST CONFERENCE TARIFF DOES NOT BAR COLT'S CLAIM

U.S. Lines and American Export Lines contend that under the Kraft Foods doctrine, all claims by Colt on behalf of the Republic of Korea are time-barred by Rule 9 of the Far East Conference Tariff.

Rule 9 of the Far East Conference Tariff provides in part:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier . . ."

In Kraft Foods v. Moore-McCormack Lines, Inc., FMC Docket 73-44, 14 SRR 603 (1974), petition for reconsideration denied,* the Commission, by a divided vote of 4 to 1, held that reparations for overcharges based upon cargo mismeasurement could not be granted because the complainant failed to comply with a tariff rule which was to the same effect as Rule 9 of the Far East Conference Tariff in the present case.

Kraft Foods could have no application to the facts involved here. It simply did not involve the massive fraud or gross negligence alleged in this case. As we have already shown, the fraud or misconduct alleged here tolls the statutory time bar in Section 22 of the Shipping Act; it surely has the same effect on the purported time bar of Rule 9.

Reduced to its essence, the ocean carriers' argument is that Rule 9 should be read as if it said that:

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*Kraft is now on appeal to the District of Columbia Circuit (Docket No. 75-1004). It has been fully briefed and is awaiting oral argument. The United States has filed a brief urging reversal of the Commission decision in Kraft.

> "Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement will not be considered even where those errors are allegedly perpetrated by fraud or reckless misconduct unless presented to the carrier in writing before the shipment leaves the custody of the carrier." (Underscoring indicates words which would be added by carriers)

Certainly, any such tariff would be absurd on its face as well as an invitation to fraud. It would be a means for emasculating the protections afforded by the Shipping Act to those, who like Colt and the Republic of Korea, must rely upon it as a guarantee of the integrity of the carriers regulated by the Act with which they deal. If the Conference Tariff were intended to have such consequences it would be patently unreasonable and itself a violation of the Shipping Act.

The facts of this case need only be recited to illustrate how unreasonable and unlikely is any such reading of Rule 9. Colt, as agent for Korea, retained Interconex, a regulated freight forwarder and NVOCC to arrange shipments on the respondent ocean carriers' vessels. Colt relied fully on Interconex's expertise and on its integrity, buttressed by its status as a federally regulated entity. Interconex then shipped goods on respondents vessels at rates computed on the basis of false weights and measures. Both Interconex and the respondent ocean carriers derived enormous amounts of money for carriage services which they never performed. Long after the goods had been delivered Colt discovered that the regulated freight forwarder and NVOCC had violated its fiduciary obligations and caused Colt's principal to pay charges based on false bills of lading and invoices. Now, when Colt seeks to recover for Korea the money which the ocean carriers and Interconex did not earn, it is met with the inequitable argument that its claim was already barred years ago when the goods were delivered to Korea by the ocean carrier -- even though Colt, relying on the representations of the NVOCC it hired to handle these matters, did not know that the charges being paid to the ocean carriers through Interconex were based on false and fraudulent weights and measures.

This situation is far different from Kraft. In Kraft, there was a simple and bona fide dispute with respect to the correct measurement of the shipment. Measurements at the loading port resulted in a figure of 284 cubic feet; the consignee at the discharge port claimed a measurement of 145.01 cubic feet. The Commission held that this was the sort of dispute which, under the provisions of the tariff rule, should be resolved by re-measurement before the goods left the custody of the carrier. The Commission regarded the rule only as "a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement", Majority Opinion at p. 5.

The unique facts alleged here are hardly -- we would hope -- a "prime cause of dispute" in this industry. They are highly unusual -- and the proceedings here are designed to make them even rarer.

Finally, even if Kraft should be read to apply to these circumstances, we submit with respect that the *Kraft* case was not rightly decided by the Commission. The case is presently on appeal before the United States Court of Appeals for the District of Columbia Circuit; and we note, in connection with that appeal, that the United States, appearing through the Department of Justice as statutory defendant, has argued that the Commission's decision in *Kraft* was wrong and should be reversed. We submit that Commissioner Hearn was quite correct, in his dissenting opinion in *Kraft*, where he points out that a tariff rule such as Rule 9 constitutes an illegal effort to abrogate the two-year statute of limitations for reparation claims contained in Section 22 of the Shipping Act.

For the convenience of the Administrative Law Judge in the present case, we attach as Appendix A to this reply brief a copy of the brief for the United States of America before the Court of Appeals in the Kraft case. We endorse the arguments made in that brief, and in particular the conclusion appearing on page 6:

> "But the Commission must nevertheless perform its function of determining the facts if a reparation claim is filed within two years. It cannot refuse, as it did here, to consider whether the complainant had discharged his burden, on the theory that he failed to make a complaint to the carrier within the time set by a tariff rule."

CONCLUSION

The serious matters presented by the complaint in this action should not be disposed of on a motion to dismiss. All of the contested issues must be resolved on a full trial. The grounds advanced for the dismissal by the ocean carriers are without merit.

WHEREFORE, complainant Colt Industries Operating Corp. respectfully prays that the motions of U.S. Lines, Inc., American Export Lines, Inc. and Sea-Land Service, Inc. to dismiss the complaint be in all respects denied.

Respectfully submitted,

SIDNEY S. ROSDEITCHER, ESQ.
DWIGHT E. TIMBERS ESQ.,

Of Counsel

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345 Park Avenue
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212-644-8000
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CHARLES S. HAIGHT, JR., ESQ.
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Of Counsel

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One State Street Plaza
New York, NY 10004
212-344-6800
Attorneys for Complainant

By ______________________________
Sanford C. Miller

August 12, 1975

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573

Re: Colt Industries Operating Corp
v. Interconex, Inc., et al.
FMC Docket 75-19

Dear Mr. Hurney:

Enclosed are an original and 15 copies of a motion to dismiss the complaint in this proceeding.

Sincerely,

Robert L. McGeorge

Enclosures
cc: William B. Harris,
Administrative Law Judge

BEFORE THE
FEDERAL MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP.,
Complainant,
v.
INTERCONEX, INC., ET AL.,
Respondents.

Docket No. 75-19

MOTION OF INTERCONEX, INC. TO DISMISS THE COMPLAINT

Interconex, Inc. (ICX) hereby moves, pursuant to Rule 5(m) of the Commission's Rules of Practice and Procedure (46 CFR §502.73), that the complaint in the above-captioned case be dismissed insofar as it relates to ICX. In support of this motion, ICX states that:

I. INTRODUCTION

Colt Industries Operating Corp., by complaint filed on June 4, 1975, sought reparation for a total of 379 shipments of Colt cargo transported from U.S. ports to Korea, occurring approximately between July 28, 1972 and February 5, 1975. It alleges that ICX, acting as a nonvessel-operating common carrier by water, prepared ocean bills of lading in which the cubic measurements and/or weights of that cargo were overstated, and that as a consequence, ICX received compensation in excess of that provided in its tariff. The complaint also states that by reason of the alleged overstated measurements and/or weights, the underlying common carriers by water, i.e., Sea-Land, American Export and U.S. Lines, received compensation in excess of that provided for in their tariffs.

II. ARGUMENTS FOR DISMISSING REPARATION CLAIMS

Colt alleged that it had been overcharged on each of the 379 shipments noted in Schedule A to its complaint. The numbers noted in the upper right-hand corner of those pages are referred to in the discussion of the rules of law applicable to each claim.

A. Cubic Measurements and Weights on ICX Bills of Lading are No Greater Than Measurements and Weights Declared by Colt

As stated by Mr. Jon Stephens, President of ICX, in the affidavit attached to this motion, all Colt cargo was tendered to ICX in sealed containers. Consistent with Colt's instructions, ICX relied upon the cargo summary sheets, shipping orders, or other means of declaring measurements and weights which were prepared by Colt or its agents who packed cargo for it (Morgan & Brother-Manhattan Storage and Rebel Van Lines) for the cubic measurements and weights of the cargo loaded in the sealed containers. ICX received no other indication of cargo measurements and weights at the time the bills of lading were executed, and it did not open any sealed containers to verify the measurements and weights of the cargo contained therein.

Based upon his review of the shipments, Mr. Stephens concludes that, with the exception of four shipments (Claim Nos. 1, 86, 183 and 184), the measurements and weights on ICX bills of lading are no greater than the measurements and weights declared by Colt or its agents on the summary sheets and shipping orders.*/

A similar situation was involved in Western Publishing Co., Inc. v. Hapag-Lloyd A.G., 12 SRR 1065 (Initial Decision 1972). There the shipper asserted that a particular shipment amounted to 394 cubic feet instead of the 425 cubic feet used by the carrier in assessing the freight, and that the cargo had been described incorrectly. The shipper attempted to prove his assertion of incorrect measurement by producing verified packing lists. The carrier based the freight charges on the measurements set forth in the dock receipt "which were the only figures available to the carrier at the time of shipment." Id. at 1066. The Judge ruled in favor of the carrier on both issues -- rejecting the shipper's challenge of both the weight figures available at the time of the shipment and the description of the cargo contained on the bill of lading prepared by the shipper.

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*/ In fact, ICX clerks often applied cargo measurements which were lower than those declared by Colt. See the ICX counterclaim for a full discussion of this issue.

The Commission upheld that decision in part and rejected it in part. It held that the shipper could challenge the description of cargo by proving what was actually shipped, and awarded reparation on that basis. As for the challenge to the measurement of the cargo, the Commission stated:

> "The Examiner's decision discusses at some length the dispute as to what was the actual measure of the total shipment and decides in favor of respondents that the total measurement was 425 cubic feet. We do not take issue with this conclusion." 13 SRR 16 (FMC 1972).

Not only were the cargo summary sheets and shipping orders the only sources of cargo measurements at the time of the shipments, as in the Western Publishing case, they were also prepared by Colt or its agents and Colt instructed ICX to apply the measurements noted therein to its bills of lading.

For two and one-half years ICX complied with Colt's instructions and relied upon the only cargo measurements and weights available to it -- those declared by Colt and its agents. For two and one-half years Colt failed to indicate any dissatisfaction with that system. Colt should not now be allowed to challenge the freight charges based upon measurements and weights provided by it according to the system initiated by it.

ICX, therefore, moves that Colt's complaint against it be dismissed with respect to all claims except for Claim Nos. 1, 86, 183, 184.*/

B. The Statute of Limitations Bars Reparation for all Shipments Occurring before June 4, 1973

Section 22 of the Shipping Act of 1916 provides that the Commission may direct the payment of reparation to complainants if the complaint is filed within two years after the cause of action accrued. There are no exceptions to the two-year limitation on the face of the statute or in the decisions construing it. The Commission, therefore, has no authority to award reparation when a complaint is filed more than two years after the cause of action accrues. United States Borax & Chemical Corp. v. Pacific Coast European Conference, 10 SRR 75 (FMC 1968). In this case, reparation based upon all bills of lading issued before June 4, 1973 (Claim Nos. 1-170) is barred by that Statute of Limitations.

ICX, therefore, moves that Colt's complaint against it be dismissed with respect to Claim Nos. 1 through 170.

C. The Kraft Rule Bars Reparation for all Shipments Governed by ICX Freight Tariff No. 3

Rule 10 of ICX Freight Tariff No. 3 (effective August 21, 1974), under the heading "Overcharges - Claims for Adjustment In Freight Charges," provides that:

---

*/ ICX has been unable to locate its records for Claim Nos. 174, 177, 247 and 278. This portion of the motion, therefore, does not refer to those claims.

> "Claims for adjustment of freight charges, if based upon alleged errors in weight or measurement, will not be considered unless presented to the Carrier in writing before the shipment involved leaves the custody of the Carrier."

The Commission considered the effect of an almost identical tariff rule*/ in *Kraft Foods* v. *Moore McCormack Lines, Inc.*, FMC Dkt. 73-44, 14 SRR 603 (1974), petition for reconsideration denied, where it ruled that the carrier was compelled to deny a refund claim submitted after the cargo had left its possession:

> "Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applied not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.
>
> * * *
>
> "Applying this mandate to the case before us, it can be seen that Moore McCormack had no alternative here but to comply with the rules of its tariff on file. *Therefore, in order that Kraft Food's claim be considered, it was required to furnish its claim to Moore McCormack prior to the time the shipment left Moore McCormack's custody*. The provisions of Rule 16 above are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or

---

*/ That rule is identical to the ICX bill of lading except that it applied to alleged errors in "description, weight and/or measurement," instead of "weight or measurement."

> re-measuring be conducted in a certain way and before the shipment at issue leaves the custody of the carrier. *This rule represents a term and condition of the tariff on file to which the carrier has no choice but to adhere scrupulously. Because Kraft Foods did not comply with these terms, reparation here could not be granted*.
>
> "This conclusion in no way restricts the right of any person to file a complaint pursuant to the provisions of Section 22 of the Shipping Act, 1916, within two years after the cause of action accrues. However, *unless the shipper submits a claim involving contested weight or measurement prior to the shipment leaving the custody of the carrier (Rule 16), the merit of any such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rates*. In this case, the shipper should have sought re-weighing or re-measuring prior to the shipment leaving the custody of the carrier as required by Rule 16 of the Moore McCormack tariff." (Emphasis added.) *Id.* at 606.

As stated by Mr. Stephens in his affidavit, Colt submitted no claim based upon alleged errors in weight or measurement to ICX while the shipment involved was in its custody. In fact, it appears that all Colt claims for adjustment of charges were submitted after the cargo had even left the possession of the underlying carriers.

ICX, therefore, moves that Colt's complaint against it be dismissed with respect to all shipments governed by ICX Freight Tariff No. 3 (Claim Nos. 306-379).

D. The Complaint Fails to State the Amount of Alleged Damage

Rule 5(b) provides that a complaint seeking reparation must set forth a number of items -- probably the most important of which is the "amount of damage." The Colt complaint only makes a guess at total alleged damage -- $500,000. It does not state the amount of damage allegedly suffered with respect to any individual shipment or even the charges which it claims should have been applied for many, if not most, shipments.

ICX, therefore, moves that Colt's complaint be dismissed against it with respect to all shipments.

III. CONCLUSION

For the reasons set forth herein, ICX moves that the complaint against it be dismissed, with prejudice.

Respectfully submitted,

Robert L. McGeorge

George F. Galland
Robert L. McGeorge
Galland, Kharasch, Calkins & Brown
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

Attorneys for Interconex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Dismiss on all parties of record by first-class mail, postage prepaid, this 12th day of August, 1975.

Robert L. McGeorge
Robert L. McGeorge

STATE OF NEW YORK)
) ss:
COUNTY OF)

AFFIDAVIT OF JON T. STEPHENS

Jon T. Stephens, being duly sworn and deposed, states as follows:

I am the President of Interconex, Inc. (ICX), and have held this position since 1969. As President, I have a general knowledge of all ICX activities.

I have directed members of my staff to review the 379 Colt shipments which are the subject of its reparation complaint in Colt Industries Operating Corp. v. Interconex, Inc., et al., FMC Dkt. 75-19. A summary of that review is contained in Appendix A to the ICX Answer and Counterclaim in that proceeding.

Of the 379 shipments in question, we were not able to immediately locate all relevant data for Colt Claim Nos. 174, 177, 247 and 278. A careful review of the remaining shipments, conducted according to my direction, shows that the cubic measurements and weights appearing on ICX bills of lading were no greater than the measurements and weights declared by Colt or its agents, except for four shipments, identified as Colt Claim Nos. 1, 86, 183 and 184.

Most of the shipments were not packed by Colt, but by professional packers hired by Colt -- Morgan & Brother - Manhattan Storage on the U.S. East Coast and Rebel Van Lines on the U.S. West Coast. Regardless of who packed the cargo, it was always tendered to ICX in sealed containers. ICX employees never opened the sealed containers to weigh or measure the cargo. Consistent with Colt's instructions on the subject, they relied upon the cubic measurements and weights as declared by Colt or its agents in the cargo summary sheets or shipping orders which described the cargo loaded (or as otherwise declared to ICX) in each sealed container, and applied measurements and weights no larger than those figures to all but four ICX bills of lading.

The declarations of cubic measurements and weights noted on the cargo summary sheets or shipping orders were the only indications of the measurements and weights of containerized cargo provided or available to us before we executed ICX bills of lading. That system of declaring measurements and weights was initiated by Colt; and during the two and one-half year period in which the shipments in question occurred, Colt never expressed any dissatisfaction with that method of reporting cargo measurements and weights. Moreover, Colt did not submit any claims to us for readjustment of freight charges based upon alleged errors in weight or measurement while the cargo in question was in our custody.

JON T. STEPHENS

Sworn to before me this 6th day of August, 1975

Joanne Madonna

ANNE MADONNA
New York
No. 41-4519899
County
te filed in New York County
on Expires March 30, 1977

BEFORE THE

FEDERAL MARITIME COMMISSION

239

INTERCONEX, INC., Complainant v. SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC., U.S. LINES, INC., Respondents	Docket No. 75-24

MOTION FOR RECONSIDERATION AND ORAL ARGUMENT BY INTERCONEX, INC.

Interconex, Inc. (ICX) moves that the Order of August 11, 1975 dismissing the above-captioned proceedings be reconsidered. In support of its motion, ICX states that:

The Order indicates that ICX did not reply to any of the motions of Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc. to dismiss its complaint. Having seen no arguments in opposition to those motions, the Presiding Officer found them well-founded and dismissed the proceedings.

While the ICX replies to those motions seem to have inadvertently failed to reach the Presiding Officer before his issuance of the Order, they were hand-delivered to the 10 Commission and mailed to all parties of record on August 6, 1975. The Secretary of the Commission acknowledged receipt of all three replies on August 7, 1975.

Having made timely replies to the respective motions to dismiss, ICX submits that the Order dismissing the proceedings should be reconsidered and that its replies should be considered in any future decision with respect to those motions.

ICX also moves that oral argument be heard with respect to any future decision on the respondents' motions to dismiss. It believes that when complex and unusual issues are involved, such as the issues presented in those motions and the replies thereto, oral argument is especially appropriate, because it is the best means for insuring that issues are fully explored and brought into sharp focus. It is especially important that parties be allowed to fully respond to opposing motions when severe consequences are at stake. In this proceeding there can be no motions more crucial to ICX than the respondents' motions to dismiss its complaint.

Under these circumstances, ICX submits that the Order dismissing its complaint should be reconsidered and that oral argument should be heard on the motions of Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc. to dismiss its complaint.

Since this motion merely asks that its previously filed reply be considered and does not inject new legal issues into the proceeding, ICX requests that, pursuant to Rule 7(c) of the Commission's Rules of Practice and Procedure (46 CFR §502.103), the time for response to this motion be limited to five days.

Respectfully submitted,

Robert L. McGeorge

GEORGE F. GALLAND
ROBERT L. McGEORGE
Galland, Kharasch, Calkins & Brown
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-2200

CERTIFICATE OF SERVICE

I hereby certify that all parties of record were served with a copy of the foregoing Motion by first class mail, postage prepaid, this 15th day of August, 1975.

Robert L. McGeorge

Robert L. McGeorge

Copy [illegible] August 11, 1975

RECEIVED
AUG 15 4 23 PM '75
OFFICE OF
ADM. LAW JUDGES
FEDERAL MARITIME COMM.

BEFORE THE

FEDERAL MARITIME COMMISSION

COLT INDUSTRIES OPERATING CORP., Complainant, v. INTERCONEX, INC., ET AL., Respondents	Docket No. 75-19

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MOTION FOR EXTENSION OF TIME WITH RESPECT TO DISCOVERY MATTERS BY INTERCONEX, INC.

Interconex, Inc. (ICX) hereby moves that it be allowed 15 days from the date on which Colt Industries Operating Corp. produces documents for copying to commence new phases of discovery generated by answers or information obtained through its earlier discovery procedures or to apply to the Commission for an order compelling answers, if necessary. In support of this motion, ICX states that:

On July 10, 1975, ICX tendered a number of written interrogatories to Colt and requested it to produce certain related documents in the Washington, D. C. office of ICX's counsel. Colt responded by: answering most of the interrogatories to the satisfaction of ICX; promising to answer two interrogatories relating to documents requested by ICX when the documents are produced; refusing to answer two interrogatories; and indicating that it would arrange with counsel for ICX to produce the requested documents at a mutually convenient time and place. It appears that the interrogatories which Colt refused to answer may be cleared-up to ICX's satisfaction when the documents are produced. Those responses were mailed from the offices of Colt's counsel on August 6, 1975 and received by ICX's counsel on August 11, 1975 — the deadline for the answers.

Counsel for Colt has informed us that the documents to be produced in compliance with the ICX requests are voluminous, filling many cartons. He suggests that we first arrange to inspect the Colt records at its Hartford, Connecticut office to determine which documents are important to ICX, and then Colt will transport the necessary documents to the New York office of ICX's counsel for copying. ICX is willing to have the requested documents produced in that manner, as long as that arrangement does not prejudice its discovery rights.

Since the interrogatories and requests for production of documents are interrelated, ICX believes that it would comply with the requirement of Rule 12(a)of the Commission's Rules of Practice and Procedure (46 CFR Section 502.201) and 46 CFR Section 502.210 by commencing follow-up discovery or applying for an enforcement order within 15 days after copying those documents in New York. The Commission's discovery rules, however, were recently established and are largely untested; and ICX wishes to fully protect its discovery rights by a ruling on the matter in advance.

ICX, therefore, requests, purusant to Rule 1(j) (46 CFR Section 502.10), which empowers the presiding officer to waive the Commission's rules, and 46 CFR Section 210(a), which empowers him to extend the deadline for seeking an enforcement order, that it be permitted to commence follow-up discovery or to apply for an enforcement order, if necessary, within 15 days after Colt produces the requested documents for copying in New York.

Counsel for Colt has indicated that it does not oppose this motion.

Respectfully submitted,

Robert L. McGeorge

GEORGE F. GALLAND
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& Brown
1054 Thirty-First Street, N.W.
Washington, D. C. 20007
(202) 333-2200

CERTIFICATE OF SERVICE

I hereby certify that all parties of record were served with a copy of the foregoing Motion by first class mail, postage prepaid, this 15th day of August, 1975.

Robert L. McGeorge

Robert L. McGeorge

(SERVED)
(AUGUST 15, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 15, 1975

NO. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.

ORDER UPON *SUA SPONTE* RECONSIDERATION OF ORDER SERVED AUGUST 11, 1975, DISMISSING COMPLAINT AND DISCONTINUING PROCEEDING

The motions of the respondents to dismiss the complaint herein all were served July 22, 1975. Under Rule 5(n) of the Commission's Rules of Practice and Procedure, 46 CFR 502.74 replies to the motions should have been filed within fifteen (15) days after service of the motions, i.e., in this instance, by July 6, 1975. When no copy of any reply was received by the said date, the order served August 11, 1975, was completed August 8, 1975, and sent to the print shop for duplication.

On August 12, 1975, one of the counsel for Interconex, Inc., came to the office of the presiding Administrative Law Judge protesting that Interconex had filed the replies to the motion within the time called for in the rules; that counsel had brought copies to the Commission on August 6, 1975, but not the required number of copies.

The presiding Administrative Law Judge received a time stamped August 8, 1975, 4:11 P.M. copy of a letter dated August 7, 1975, from the Secretary of this Commission to counsel for Interconex acknowledging receipt of replies to motions of Sea-Land, American Export and U. S. Lines to dismiss in Docket 75-24, and asking for additional copies to comply with the rules.

On August 12, 1975, copies of Interconex's replies were received in the office of the presiding Administrative Law Judge. The replies are stamped as received in the Office of the Secretary on August 7, 1975. All of the replies bear an August 6, 1975, service date.

In view of the above, the presiding Administrative Law Judge, *sua sponte*, decided to consider the replies of Interconex and to reconsider the August 11, 1975, order.

The contentions of Sea-Land Service, Inc., American Export Lines, Inc., and U. S. Lines, Inc., are set forth in the order of August 11, 1975, so will not be reiterated here; only Interconex's replies as to each, namely:

Sea-Land Service, Inc. - Interconex, *inter alia*, disagrees with the contention that the complaint fails to state a cause of action, since Interconex incorporated the Colt complaint in Docket 75-19 by reference, but did not charge any other violations of the Shipping Act, because it intended to charge Sea-Land with exactly the same violations charged by Colt--no more, no less; that the complaint clearly notifies Sea-Land of Interconex's claim so that a defense can be prepared; that it is the duty of the Commission to hear the complaint against Sea-Land, not to reject it because it may not resemble exactly the pleadings usually found in the same pigeon-hole. And, that most of the money paid by Colt ended up in the hands of the underlying carriers. Also that Interconex must simultaneously defend the Colt action and adopt the Colt allegation against the carriers so as not to prejudice the right to recover by the running of the Statute of Limitations provision of the Shipping Act. Interconex argues that Sea-Land should not prevail in its motion to dismiss the complaint of Interconex, a shipper, unless Interconex prevails in its motion to dismiss the complaint of its shipper, Colt.

American Export Lines, Inc. - Interconex contends, *inter alia*, the facts that neither summary judgments nor cross-claims are expressly provided for in the Commission's rules does not affect the sufficiency of pleadings authorized by the Commission's rules which are designed to accomplish the same purpose; that Interconex takes no position concerning AEL's argument that *Kraft Foods v. Moore McCormack Lines, Inc.*, rule precludes its claim for reparation.

United States Lines, Inc. - Interconex contends, *inter alia*, that section 22 of the Shipping Act provides that any person may file with the Commission a "sworn complaint" setting forth any violation of the

Act; the Commission's Rules of Practice and Procedure allow a separate complaint in the nature of a cross-claim, and this is a separate complaint, not the usual type of type of complaint filed with this Commission; it alleges that, if Interconex violated the Shipping Act with respect to Colt, United States Lines, Inc., violated the Act with respect to Interconex, and that the complaint states a cause of action, whether the term "reparation," "indemnification" or "damages" is used. Interconex demands that overpayments be returned to it. Interconex also proceeded to attempt to cure the procedural deficiency of the complaint as to authority of an officer of Interconex to sign the complaint.

Discussion

Upon review, consideration and reconsideration of the matters herein, it cannot be said that Interconex has supplied convincing arguments or data to support that the statutes and Rules of Practice and Procedure under which the Commission operates, permit sustaining of what Interconex admits is in the nature of a counter claim as as allowed in the United States District Courts under the Federal Rules of Civil Procedure. The Federal Maritime Commission is simply without authority so to proceed. Further, under the positions and arguments taken in the motions to dismiss, as opposed to those in the replies now considered, dismissal of the complaint seems warranted.

Wherefore, having previously considered the motions to dismiss, and now the replies thereto and having reconsidered the order served

August 11, 1975, as well as the motions and replies, no facts, arguments or applicable laws or Rules of Practice and Procedure have been presented that were not previously considered, and now having been considered and reconsidered warrant any changes or modifications in the order of August 11, 1975.

Wherefore, it is this 15th day of August, 1975,

Ordered.

(A) The motions of Sea-Land Service, Inc., American Export Lines, Inc., and United States Lines, Inc., respectively to dismiss the complaint herein as to each of them, be and hereby is granted.

(B) The order served herein August 11, 1975, be and hereby is reasserted.

(C) This proceeding is discontinued.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

(SERVED)
(AUGUST 19, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 19, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ORDER DENYING MOTION FOR EXTENSION OF TIME WITH RESPECT TO DISCOVERY MATTERS

On August 15, 1975, Interconex, Inc., filed a motion that it be allowed 15 days from the date on which Colt Industries Operating Corp. produces documents for copying to commence new phases of discovery generated by answers or information obtained through its earlier discovery procedures or to apply to the Commission for an order compelling answers, if necessary. In support of the motion, Interconex states, *inter alia*, in response to interrogatories and request to produce certain documents, Colt responded and are willing for Interconex to inspect Colt's records at its Hartford, Connecticut, office to determine which documents are important to Interconex. This is agreeable to Interconex. However, Interconex says the Commission's discovery rules were recently established and are largely untested; and Interconex wishes to fully protect its discovery rights by a ruling on the matter in advance.

The motion stated that Colt indicated it had no opposition to the motion.

Discussion

It is not clear what the movant means that the Commission's discovery rules were recently established. The discovery rules were amended effective September 16, 1974.

The motion should be denied because to do otherwise would be to perform what the law abhors, a vain act. Of course, it does give the movant the ruling on the matter in advance requested, so that as to the movant it possibly is not such a vain act, even if the motion is denied. The reason it is a vain act other than to deny the motion is that Interconex began its discovery proceedings herein as to Colt on July 10, 1975, through service of Interrogatories and Request for Production of Documents earlier than 30 days after the June 17, 1975, publication in the *Federal Register* of the notice of the filing of the complaint. Under 46 CFR 502.201, if particular discovery is in the nature of a new phase of discovery generated by answers or information obtained through the earlier discovery procedures begun within 15 days after such answers have been served, or such information obtained, those discovery procedures are allowed to be completed. The 15 days is the same amount of time that the movant requests. There is no need at this point to utilize Rule 1(j) and waive any rules or 46 CFR 502.210(a) to extend the deadline for seeking an enforcement order that may never be needed.

Wherefore, upon consideration of the above, it is this 19th day of August, 1975,

Ordered,

The motion for extension of time with respect to discovery matters, be and hereby is denied.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,

Respondent

Docket No. 75-24

REPLY TO OPPOSITION TO INTERCONEX MOTION FOR ORAL ARGUMENT

By Motion served August 15, 1975 Complainant, Interconex has requested reconsideration of the August 11, 1975 Order dismissing its complaint against Sea-Land Service, Inc., American Export Lines, Inc., and United States Lines, Inc. (USL) with a further request that oral argument be heard on the underlying motions to dismiss filed by the three respondents.

USL submits that while any clerical error which may have delayed consideration of Interconex's Reply to USL's

Motion to Dismiss may be remedied by its Motion, dismissal of Interconex's Complaint is still required because Interconex's Reply fails to take issue with the rules of law advanced by USL in support of its Motion to Dismiss.

In these circumstances, oral argument would provide no assistance to the Presiding Officer since Interconex's Reply did not take issue with or argue against the authorities relied upon by USL in its Motion to Dismiss.

WHEREFORE, USL requests that Interconex's Motion for oral argument be denied and that the Order of August 11, 1975 dismissing its complaint be confirmed with appropriate reference to the Reply filed by Interconex.

Respectfully submitted,

Russell T. Weil
Russell T. Weil

James P. Moore
James P. Moore

Kirlin, Campbell & Keating
900 Seventeenth St., N.W.
Washington, D.C. 20006

August 19, 1975

Attorneys for United States Lines, Inc

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply have been served upon the parties or where indicated counsel for the parties to this proceeding by first class mail, postage prepaid, this 19th day of August, 1975.

James P. Moore
James P. Moore

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.
Respondents

DOCKET NO. 75-24

REPLY TO MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT OF INTERCONEX, INC.

Comes now Sea-Land Service, Inc., respondent in the above docketed proceeding and files this reply to the motion for reconsideration and request for oral argument served August 15, 1975 by complainant herein.

It is the position of Sea-Land Service, Inc. that administrative error on the part of either Interconex or employees of the Commission are not controlling in this case and cannot be remedied by the instant motion since neither Interconex's complaint nor reply states a definitive cause of action or faces the issues raised by Sea-Land Service, Inc. in support of its motion to dismiss filed July 22, 1975. Such being the case, oral argument cannot but delay the implementation of the dismissal order of the presiding judge in this case effective August 11, 1975.

WHEREFORE, Sea-Land requests that Interconex's motion for reconsideration and request for oral argument be denied and that the order of dismissal of August 11, 1975 be affirmed with the appropriate reference to the reply filed by Interconex.

Respectfully submitted,

SEA-LAND SERVICE, INC.
P. O. BOX 900
EDISON, NEW JERSEY 08817

BY:
ELDERED N. BELL, JR.
DIRECTOR, REGULATORY AFFAIRS

FRANK HILJER, JR.
COMMERCE MANAGER

CERTIFICATE OF SERVICE

I certify that I have this day served copy of this motion on all parties of record by sending same properly addressed via first class U.S. mail, postage prepaid.

Dated at Edison, New Jersey this 20th day of August, 1975.

ELDERED N. BELL, JR.

VERIFICATION

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Eldered N. Bell, Jr., being first duly sworn on oath deposes and says that he is Director of Regulatory Affairs, Sea-Land Service, Inc. and is the person who signed the foregoing answer and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

ELDERED N. BELL, JR.

Subscribed and sworn to before me, a notary public in and for the State of New Jersey, County of Middlesex, this 20th day of August, A.D. 1975.

DOROTHY VECCHIARELLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 15, 1977

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents

Docket No. 75-24

APPEAL FROM AN ORDER OF ADMINISTRATIVE LAW JUDGE DISMISSING THE COMPLAINT

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Attorneys for Complainant

August 25, 1975

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents

Docket No. 75-24

APPEAL FROM AN ORDER OF ADMINISTRATIVE LAW JUDGE DISMISSING THE COMPLAINT

This is an appeal to the Commission from an Order of Administrative Law Judge William Beasley Harris served August 15, 1975, dismissing the complaint and discontinuing this proceeding. The appeal rests on Rule 10(m).

I. INTRODUCTION

On June 4, 1975 Colt Industries Operating Corp. instituted proceedings in FMC Docket No. 75-19 by filing a reparation complaint against Interconex, Inc. (ICX), Sea-Land Service, Inc., American Export Lines, Inc. (AEL) and U. S. Lines, Inc. (USL). That complaint alleged that the cubic measurements and/or weights of cargo shipped by it from U.S. ports to Korea (during the period July 28, 1972 to February 5, 1975) were less than the measurements and/or weights stated on the bills of lading issued by ICX, a nonvessel operating common carrier by water (NVOCC), and by the other respondents (underlying carriers). Colt alleged that, by virtue of the overstated cargo measurements or weights, ICX and the underlying carriers (Sea-Land, AEL and USL) received compensation in excess of that provided for in their respective tariffs, contrary to Section 18(b)(3) of the Shipping Act of 1916. Colt alleged further that ICX acted as an NVOCC with respect to the shipments in question, and therefore stood in the role of carrier with respect to the shipper, and of shipper with respect to the underlying carriers.

ICX replied that its bills of lading showed cargo measurements and weights no greater than those declared to ICX by Colt or its agents, and that it computed Colt's freight charges according to its (ICX's) tariff rates, and paid freight charges to the underlying carriers based upon the same cargo measurements or weights listed on ICX's own bills of lading, at the tariff rates of those carriers. In addition, it pleaded several affirmative defenses and moved that the Colt complaint be dismissed.

ICX believed, and was advised by counsel, that if held liable to Colt in Docket 75-19, it would have a similar claim, for the same reasons, against the underlying carriers. But since the two-year statute of limitations under Section 22 of the Shipping Act had already started to run against such claims, ICX was bound to file a complaint immediately to protect such claims against extinction through lapse of time. This it did by filing the complaint in this case. It is that complaint which the presiding judge dismissed by the order on purported reconsideration which we now bring before the Commission for review.

The judge at first dismissed the complaint by overlooking the ICX reply to the dismissal motion. His order of August 11 said that ICX had "replied to none" of the dismissal motions, when in fact it had replied to all. ICX was then forced to move for reconsideration, which it did on August 15. On the same day, the judge issued a new dismissal motion reciting that he had reconsidered his earlier order "sua sponte", and adhered to his original decision. We note that the judge on "reconsideration" rejected every point in the ICX replies without analysis, without citation of authority, and without specification of any legal or factual deficiency. The release of the order on reconsideration within hours after ICX requested reconsideration suggests that the order was written before the motion was filed.

In any event, the order under review never approached the issues which the record tendered. Under the section mislabeled "discussion", the order states merely that --

(a) The relevant statutes and rules (not identified) do not "permit sustaining what Interconex admits is in the nature of a counterclaim", and

(b) Dismissal of the complaint "seems warranted" (for reasons not stated).

The factual postulate of item (a) -- that ICX admits its complaint to be "in the nature of a counterclaim" -- is simply wrong. The resemblance to a counterclaim is not admitted, and it does not exist. A counterclaim is a claim by a defendant against a plaintiff -- which the ICX complaint is not. ICX characterized its complaint as resembling a "cross-claim" -- meaning a contingent claim which a defendant would have against a third party if the defendant were held liable to the plaintiff.

Since the Commission's rules do not provide for third-party procedure, ICX did not try to invoke it in the Colt case (Docket 75-19). Rather, it started a new case -- this case -- to assert a claim as an NVO against the underlying carriers if Colt should prevail against ICX in Docket 75-19. The inability of ICX to bring new defendants into the Colt case in no sense precludes ICX from suing the same parties in a new case. Differently stated, the fact that two cases cannot be tried as one does not mean that they cannot be tried as two.

As to item (b) -- that dismissal "seems warranted" -- we can say only that it represents a process of decision by judicial trance. The judge could have stated with equal persuasiveness that dismissal "seems unwarranted." In neither event could the Commission or any court tell why the judge decided as he did, nor examine the legal or factual basis of his conclusion. A decision having no basis but that "it seems" better than an opposite decision represents a negation of the law's demand that agency action rest on a foundation more substantial than an unarticulated hunch. See 5 U.S.C. §§ 556-57.

We submit that the Administrative Law Judge has at no time contrived to bring this case into focus. It was started for the sole purpose of tolling the statute of limitations in order to protect ICX against a potential squeeze. That is a legitimate and often necessary objective of litigation, and no conceivable precept of justice or fair play requires or permits any tribunal to seek ways of defeating it.

The case, in its simplest terms, is this. Colt sued ICX and its underlying carriers in Docket 75-19 for recovery of alleged overcharges. ICX claims that (a) its charges were proper on the basis of Colt's weight and measurement data, but (b) if ICX was obligated to correct Colt's data downward, thus reducing the freight, so were the underlying carriers obligated to correct ICX's data downward -- and they would then owe freight refunds to ICX.

Because the statute of limitations is running against ICX, it had to file its complaint against the underlying carriers promptly, or lose whatever rights it had against them. Accordingly, it filed.

We have found no law as to a carrier's duty to investigate and reduce a shipper's over-declaration of weight or volume of cargo tendered in sealed containers. Consequently, ICX cannot know before the Colt case (Docket 75-19) is decided whether it will have a good claim against its underlying carriers if Colt wins its own case. In any event, ICX has no reason to make any unconditional claim against the underlying carriers unless it is held liable to Colt -- but there is no reason to prevent it from taking protective action as a safeguard against future exposure.

The plain truth is that there is no need even to pass on the motion to dismiss until the Colt case is decided. The ICX complaint can remain on file with no prejudice to any underlying carrier. No such carrier needs to take any action on the complaint. At the same time, the ICX complaint apprises the underlying carriers of all relevant facts so that they can investigate seasonably all matters calling for investigation and thus safeguard themselves against the burden of responding in the future to stale claims that are hard to disprove.

Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot -- in which case the ICX complaint can be dismissed or withdrawn. But if the Colt decision calls for activation of the ICX complaint, it can then be prosecuted, defended, and decided under the law as then declared, and without prejudice to any party by virtue of its pendency in inactive status between now and then. With a timely motion to dismiss on file, the underlying carriers will have every opportunity to test the complaint against them with no loss of any substantial right. At the same time, ICX will be able to test its rights without finding itself foreclosed by the statute of limitations. All parties will then be protected and the Commission will have fashioned the tools for righting a wrong as mandated by the Supreme Court in California v. United States, 320 U.S. 577, 583 (1943).

For all of these reasons, we feel that the status quo can properly be maintained pending final determination of the Colt litigation -- meaning that the ICX complaint, and the motion to dismiss it, remain on file in suspended status until Docket 75-19 is terminated.

We recognize that suspension of the complaint and dismissal motion may postpone the start of hearing beyond December 5, 1975 as prescribed in the Commission notice of July 2, 1975. That, however, is not an immutable date and can be changed as the interests of justice require. The holding of a hearing is not an end in itself. Much less is the holding of a hearing on a particular schedule an end in itself, when the schedule perverts justice, and more particularly when the hearing may never have to be held. In any event, the Commission, in setting the time for hearing, must have due regard for the necessity of the parties. 5 U.S.C. §554(c).

If, however, the dismissal motion is to be decided now, it should be denied on the merits. The presiding judge was wrong in placing ICX under the burden of establishing that its complaint is sustainable. The rule is the precise opposite. As Examiner Marshall held in Domestic Guam Trade, 7 SRR 167 (1960):

> "...it is well established that a complaint may be dismissed on motion only if clearly without any merit. Dismissal for such insufficiency may not be granted 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of a claim.' 2 Moore's Federal Practice (2d Ed.) ¶12.08."

The complaint filed by ICX fulfills completely the office of a pleading under modern administrative and judicial concepts. As stated in Davis, Administrative Law Treatise, §8.04:

> "The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. In the judicial system the long-term movement has been from the common-law system of pleading to formulate issues, to the early code ideal of stating all material facts, to the view now prevailing in the federal courts

> that fair notice is the objective. Of pleading in the courts, Profession [sic] Moore says in his treatise: 'The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved.... A generalized summary of the case that affords fair notice is all that can be expected.'"

As noted in Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841-42 (D.C.Cir. 1950):

> "The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law."

See also Douds v. International Longshoremen's Ass'n., 241 F.2d 278, 283 (2nd Cir. 1957).

Neither the original dismissal order nor the order on reconsideration reveals in any useful way which of the asserted grounds for dismissal the hearing judge accepted. If he felt that incorporation of the Colt complaint into the ICX complaint was an unacceptable pleading technique, he could have authorized or required an amendment under Rule 5(b) of the Commission's Rules of Procedure, which provides for amendment where a complaint omits to indicate the provisions of law allegedly violated or "clearly to state facts which support the allegations." Under this rule, the amendatory process can be invoked on the Commission's own initiative. ICX does not concede the inadequacy of its complaint in any respect whatever, but under Rule 5(b), claims the right of amendment if necessary to save the complaint from dismissal where dismissal subjects ICX to irreparable injury. Refusal to afford opportunity to amend constitutes an abuse of discretion under the circumstances of this case.

The hearing judge's order on reconsideration dismissing the complaint should be reversed.*/

Oral argument is requested.

Respectfully submitted,

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Robert L. McGeorge
Galland, Kharasch, Calkins
& Brown
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

Attorneys for Complainant

August 25, 1975.

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*/ We ask the Commission to note that if this appeal is denied ICX could protect its claim against the respondents (as far as not time-barred) only by filing a complaint (or amended complaint if allowed) charging that a carrier must correct downward its shipper's overstatement of weight or measurement, and refund freight accordingly. That allegation would be inconsistent with ICX's position in defending the Colt complaint in Docket 75-19. ICX contests the Commission's right to force ICX to prejudice its position in one case in order to protect its rights in another. If, however, the Commission places ICX in that position by denying this appeal, we request that the denial be accomplished by a formal commitment that ICX's pleading as above set forth, in a new or amended complaint against these respondents will not be treated as an admission against ICX's interest in Docket 75-19.

CERTIFICATE OF SERVICE

I hereby certify that all parties of record were served with a copy of the foregoing Appeal by first class mail, postage prepaid, this 25th day of August, 1975.

George F. Galland

BEFORE THE

FEDERAL MARITIME COMMISSION

- x

COLT INDUSTRIES OPERATING CORP., on its own behalf and as agent for the Government of the Republic of Korea, :

Complainant, :

-against- : FMC Docket No. 75-19

INTERCONEX, INC., SEA-LAND SERVICE, INC., AMERICAN EXPORT LINES, INC., and U.S. LINES, INC., :

Respondents. :

- x

REPLY OF COMPLAINANT COLT INDUSTRIES OPERATING CORP., ON ITS OWN BEHALF AND AS AGENT FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA, IN OPPOSITION TO THE MOTION OF INTERCONEX TO DISMISS THE COMPLAINT

Preliminary Statement

Colt Industries Operating Corp. ("Colt") files this memorandum on its own behalf and as agent for the Republic of Korea in opposition to Interconex Inc.'s ("Interconex") motion to dismiss the complaint.

Interconex's motion consists of four points, two of which simply repeat arguments concerning the statute of limitations and the Kraft Foods doctrine already made by the ocean carriers'* prior motion to dismiss. Colt's Reply to the Motions of Sea-Land Service, Inc. et al., dated August 12, 1975 has already dealt with these two points at length. Since Interconex adds nothing to the arguments made by the ocean carriers on these points, Colt deals with them only summarily here and respectfully refers to its earlier Reply to the ocean carriers' motions on these points. (See Colt's Reply, dated August 12, 1975, pp. 20-26).

The two remaining points raised by Interconex, as we show below, have no place on a motion to dismiss. They involve questions of fact which will be the subject of discovery and investigation and constitute disputes which can only be resolved by a full hearing on the merits.

THE PROCEEDINGS

This is a proceeding under Section 22 of the Shipping Act of 1916, 46 U.S.C. § 821. Colt seeks to recover reparations for overcharges made by Interconex and the three ocean carriers on shipments made to the Republic of Korea. The complaint, which must be taken as true on this motion, alleges that the overcharges were made through the presentation by Interconex of false invoices reflecting either fraud or gross negligence and resulting in enormous windfall profits to all of the respondents.

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* Throughout this memorandum we refer to the Respondents Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc. as the "ocean carriers".

INTERCONEX'S MOTION

Interconex argues that the complaint should be dismissed because a) they relied, pursuant to Colt instructions, upon "cargo summary sheets" prepared by Colt or its agents in calculating the charges billed to Colt, b) the complaint fails to give a precise dollar figure of the total damage sought, c) the action is barred by the Federal Maritime Commission's two year statute of limitations period and d) the action is time barred by an Interconex tariff rule, on the basis of the Kraft Foods doctrine.

The first two arguments are clearly inappropriate on a motion to dismiss the complaint since they involve issues of fact. Interconex relies, for its first point, on a self-serving affidavit of its President which is contradicted by the accompanying affidavit of Daniel Berdell as well as the affidavit of Mr. Sarkis, sworn to August 1, 1975, submitted with Colt's Reply to the ocean carriers' Motions to Dismiss. Mr. Berdell's and Mr. Sarkis' affidavits demonstrate that the facts are not as stated by Mr. Stephens, but rather, show that Interconex engaged in fraud or with a reckless disregard for the true facts tantamount to fraud. Resolution of this controversy must, of course, await a full evidentiary hearing.

As for damages, Colt's complaint does allege damage in an amount estimated at about $500,000. That the figure is not more precise is not unusual at this pre-discovery stage of the proceedings, especially where fraud and concealment are alleged bases of liability. Full investigation, discovery and the hearing will determine the precise amount of the overcharges resulting from Interconex's misstatements of the weights and measures.

As Colt has already shown in detail in its prior Reply to the ocean carriers' identical arguments, Interconex's last two arguments dealing with time limitation periods are without merit in light of the fraud or gross negligence tantamount to fraud which is the subject of this proceeding.

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ARGUMENT

I. WHETHER INTERCONEX HAS A LEGITIMATE EXCUSE FOR ITS MISSTATEMENTS OF WEIGHTS AND MEASURES RAISES ISSUES OF FACT WHICH CANNOT BE RESOLVED ON A MOTION TO DISMISS

Interconex contends that in preparing its bills of lading and invoices, "ICX relied upon the cargo summary sheets, shipping orders, or other means of declaring measurements and weights which were prepared by Colt or its agents who packed cargo for it" (Brief, p. 2). The affidavit of Mr. Stephens expands upon this representation (p. 2), where he says:

> "The declarations of cubic measurements and weights noted on the cargo summary sheets or shipping orders were the only indications of the measurements and weights of containerized cargo provided or available to us before we executed ICX bills of lading."

Interconex's reliance upon such inadequate documentation is claimed to be the result of instructions from Colt (Brief, p. 2) pursuant to a "system of declaring measurements and weights" initiated by Colt. (Affid. p. 2). Interconex paradoxically concludes that "the measurements and weights on ICX bills of lading are no greater than the measurements and weights declared by Colt or its agents on the summary sheets and shipping orders" (Brief, p. 3).*

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* Interconex's counterclaim asserts that, on the contrary, Interconex improperly applied lower cargo measurements than those declared by Colt.

Contrary to Mr. Stephens' conclusionary affidavit, Daniel Berdell sets forth in detail what events actually transpired.

Because Colt lacked experience in exporting goods abroad, it retained Intercon handle the Korean Project. Colt relied upon Interconex warehousemen, with their greater knowledge and expertise, to set-up the procedures necessary to efficiently coordinate and expedite shipments for the project and to handle the documentation. Colt never instructed Interconex as to what documents it should use in calculating the charges billed to Colt (Berdell Affid. ¶¶ 2, 9). Considering the relationship between Colt and Interconex, such an instruction would have been highly presumptuous.

Moreover, as the Sarkis affidavit shows, an experienced and professional NVOCC could not reasonably and in good faith have relied upon a summary statement listing only the dimensions of a container as being a reflection of the actual content of the container. (See Sarkis' Affidavit, ¶ 12).

In addition the Berdell affidavit disputes Mr. Stephens' representation that Interconex never received the type of documentation from which they could have derived specific weights and measures. For a substantial number of the shipments, Berdell states that Interconex did receive the requisite documentation necessary to calculate charges on specific weights or measures. For the remaining shipments it is clear that if Interconex did not recieve adequate documentation, they should have requested them. But as the Berdell Affidavit points out Interconex never complained that it was missing the documents, rather, Interconex now concedes that its employees proceeded to bill Colt on the basis of insufficient information.

The Berdell Affidavit and the Sarkis Affidavit make it clear that, at the very least, a substantial factual dispute exists which can only be resolved on a full evidentiary hearing.

In support of its motion Interconex cites Western Publishing Co., Inc. v. Hapag-Lloyd A.G., 12 S.R.R. 1065 (Initial Decision 1972), aff'd, in part, rev'd in part, 13 S.R.R. 16 (FMC 1972). That case does not support the proposition that Interconex is entitled to prevail on a motion to dismiss, since the resolution of the issues in that case occurred only after a full evidentiary hearing.

II. COLT'S INABILITY TO MORE PRECISELY STATE ITS DAMAGES WITHOUT FURTHER DISCOVERY AND INVESTIGATION DOES NOT WARRANT DISMISSAL

Interconex cites Rule 5(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.62) for the proposition that a complaint for reparations must contain the "amount of damage." From there Interconex moves to the conclusion that the complaint in this action should be dismissed.

Colt's complaint does state the amount of damages as being estimated at about $500,000. Colt's inability to state the amount more precisely reflects the difficulty of completing the investigation of complex documents on 379 different transactions, and the unavailability of information which is in the possession of Interconex or other persons. The actual damage figure may be in excess of $500,000. The precise amount of the damages inflicted by Interconex can only be determined after completion of discovery and Colt's own investigation. The Commission's Rules specifically provide for discovery, recognizing that all of the details of a claim cannot be known at the time a complaint is filed. Colt's inability to state more precisely the damages it suffered before completing discovery and investigation is surely no ground for dismissal of the complaint.

III. THE TWO YEAR LIMITATIONS PERIOD SHOULD BE TOLLED

Interconex argues that pursuant to Section 22 of the Shipping Act of 1916 the Federal Maritime Commission's two year statute of limitation period bars all Colt shipments with bills of lading dated before June 4, 1973. (See Schedule A of Complaint # 1-170).

As Colt has previously argued in its reply to the same argument made by the ocean carriers in their motions to dismiss (Colt's Reply dated August 12, 1975, pp. 20-23) it is well established that where the facts underlying a cause of action are concealed through fraud or wrongful acts amounting to fraud, the running of the applicable statute of limitations period should be tolled.

In the instant case, as the Affidavit of Anthony Sarkis clearly shows, Interconex's misstatement of weights and measures, which resulted in substantial overcharges to the benefit of Interconex and the ocean carriers, was concealed from Colt. Since the documentation here was so voluminous and the calculation procedures so complex, it was not until late 1974 that Colt became suspicious of any overcharges and did not become aware of its scope or nature until February 1975. (Sarkis Affid. ¶¶ 2-10).

If the two year statute of limitations period were to be applied here, the effect would be to permit Interconex to profit by its own wrong.

Interconex argues in its memorandum (p. 5) that there are "no exceptions to the two year limitation on the face of the statute or in the decisions construing it." But it has been held that:

> "Under federal law when a federal cause of action involves a fraud, the running of a federal statute of limitations is suspended until discovery of the fraud, despite the failure of the statute to contain such a qualifying provision. This equitable doctrine or mitigating construction is read into every federal statute of limitations." *Winkler-Koch Engineering Co.* v. *Universal Oil Products Company*, 100 F. Supp. 15, 29 (S.D.N.Y. 1951).

Consequently, there is more than adequate precedent for tolling the statute of limitations here.

IV. THE *KRAFT FOODS* DOCTRINE DOES NOT APPLY TO SITUATIONS INVOLVING FRAUDULENT CONCEALMENT

Interconex argues that Rule 10 of its Freight Tariff No. 3 (effective August 21, 1974), requiring that adjustment of claims for errors in weights or measures be submitted to Interconex while the pertinent goods are in its custody, dictates that Colt shipments leaving Interconex's custody after August 21, 1974 be dismissed. In support of its argument Kraft Foods v. Moore McCormack Lines, Inc., 14 SRR 603 (1974) is cited.

Again, as we pointed out in reply to the same argument made by the ocean carriers, the Kraft Foods decision was never intended to be applied to a situation where fraud or acts tantamount to fraud prevented the claimant from discovering that overcharges had been made until the goods had already left the custody of the carrier. (Colt's Reply, dated August 12, 1975, pp. 23-26) Moreover, in the instant case, as the Berdell Affidavit points out (¶¶ 7, 8, 10), Interconex frequently failed to provide Colt in a timely manner with documentation from which Colt could have discovered the existence of overcharges. Even assuming that Colt could have pieced together the maze of documentation Interconex had been hired to handle, timely filing of claims with Interconex would have been impossible since Colt did not receive the relevant underlying documentation until after the corresponding shipments had left Interconex's possession.

Conclusion

The contested factual issues raised by this motion dictate that they be resolved after a full trial. The legal issues raised by this motion are without merit.

WHEREFORE, complainant Colt Industries Operating Corp. respectfully prays that the motion of Interconex to dismiss the complaint be in all respects denied.

Respectfully submitted

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Of Counsel

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(S E R V E D)
(SEPTEMBER 5, 1975)
(FEDERAL MARITIME COMMISSION)

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FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

September 5, 1975

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ORDER
(1) GRANTING MOTIONS TO DISMISS COMPLAINT
(2) GRANTING MOTION TO DISMISS COUNTERCLAIM
(3) DENYING MOTION FOR ORAL ARGUMENT
(4) DISCONTINUING PROCEEDING

This proceeding, brought by Colt Industries Operating Corp. (Colt) on its own behalf and as agent for the Government of the Republic of Korea, against Interconex, Inc. (Interconex) as an independent ocean freight forwarder and/or a nonvessel operating common carrier by water with whom Colt had contracted for Interconex to arrange for ocean carriage shipment of merchandise to Korea, is ostensibly a proceeding alleging violation of Section 18(b)(3) of the Shipping Act, 1916, as amended, and reparation for such alleged violations in the estimated amount of $500,000, not alone from Interconex, but also the carriers of the shipments, Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL), and U. S. Lines, Inc. (U. S. Lines). Under a realistic appraisal of the pleadings filed herein, and the taking of official notice of Docket No. 75-24, this ostensible reparation proceeding fades from sight and a rather complex proceeding emerges patently not within the parameters of the statutory responsibility of this Commission, but those of a court with inherent equity jurisdiction, and exercising jurisdiction over all maritime contracts, torts, injuries or offenses. This Commission is without such jurisdiction. While jurisdiction in its proper sense means authority to hear and decide a cause, it is common to speak of jurisdiction in equity as not relating to the power of the agency to hear and determine a cause, but as to whether it ought to assume the jurisdiction and hear and decide the cause.

The Federal Maritime Commission is not a court. It is an administrative agency and as such has no inherent judicial power. It can exercise only those powers conferred upon it by Congress. *FMC v. Anglo Canadian Shipping Co.*, 4 SRR 20,456 (1963), 335 F(2d) 255, (CA-9, 1964). The Commission cannot rely for its action on the powers of a court of equity. *Transpacific Freight Conference of Japan v. Federal Maritime Board*, 302 F(2d) 875 (1962).

Jurisdiction is not conferred merely by a judicial or other assertion, it must have a basis in law and in fact. And, it is a maxim of equity, that equity having once assumed jurisdiction of a controversy, on any equitable ground whatever, will retain it and administer complete justice upon all grounds between the parties. Already Interconex's counterclaim has been dismissed where it was filed as a complaint in Docket No. 75-24 because this Commission's Rules of Practice and Procedure do not provide for counterclaims. Obviously, this Commission cannot administer complete justice upon all grounds between the parties. There are allegations of a contract between Interconex and Colt; a contract between Colt and the Government of Korea.

Colt charges that the respondents were unjustly enriched in that Interconex either fraudulently, negligently or by reason of gross negligence and recklessness misstated the cubic measurements and/or calculations of weight of the shipment, and Colt would have "this matter proceed to a determination of the liability of all those who have unjustly benefited at the Republic of Korea's expense" (Colt's reply to Motions to Dismiss, p. 3), and Colt asks that it and the Federal Maritime Commission be allowed to determine all the facts in a full proceeding (Ibid. p. 6). Determining all of the facts is one thing, but the equitable power necessary to grant to all the relief demanded thereby or asked for in the complaint, is another, which, is not within the jurisdiction of this administrative agency.

The contract between Colt and Interconex allegedly was entered into on or about November 11, 1971, and between July 28, 1972 and February 5, 1975, Interconex arranged for ocean carriage shipment of merchandise on a number of vessels of the named respondents, who, Colt alleges, received compensation in excess of that provided by the Far East Conference tariff and other applicable tariffs in violation of Section 18(b)(3) of the Act.

On July 11, 1975, Interconex filed (served July 10, 1975) an answer to the complaint and a counterclaim against Colt. On August 6, 1975, Colt served (filed August 7, 1975) a reply to the counterclaim. (On June 24, 1975, Interconex filed (served July 2, 1975, after reconsideration by Secretary of Commission, of rejection of complaint) a complaint in Docket No. 75-24 against Sea-Land, AEL and U. S. Lines. That complaint in Docket No. 75-24, as indicated above, was dismissed and the proceeding discontinued by notices served August 11 and 15, 1975. That matter is now on appeal to the Commission.) On August 12, 1975, in this Docket No. 75-19, Interconex served and filed a motion to dismiss the complaint herein. Colt served a reply thereto on August 27, 1975 (filed August 29, 1975). Interconex asked that Colt's complaint against it be dismissed with respect to all claims, and as reasons therefor stated, *inter alia,* that all Colt cargo was tendered to Interconex in sealed containers, and that Interconex relied upon the cargo summary sheets, shipping orders, or other means of declaring measurement and weights which were prepared by Colt or its agents who packed cargo for it, and that the measurements and weights on Interconex's bills of lading were no greater than those declared by Colt or its agents on the summary sheets and shipping orders. And, for two and a half years Colt failed to indicate any dissatisfaction with that.

Interconex also stated that Statute of Limitations of Section 22 of the Shipping Act, 1916, bars reparation for all shipments occurring before June 4, 1973. And, Interconex contends that the *Kraft Foods v. Moore McCormack Lines, Inc.*, Docket No. 73-44 (1974) rule bars reparation for all shipments governed by Interconex Freight Tariff No. 3, in that all Colt claims for adjustment of charges were submitted after the cargo had left the possession of the underlying carriers. Further, Interconex said the complaint fails to state the amount of alleged damage as provided for in Rule 5(d) of the Commission's Rules of Practice and Procedure.

Colt in its reply to Interconex's motion to dismiss, now states that "This is a proceeding under Section 22 of the Shipping Act, 1916."

Colt argues that Interconex's arguments that (a) Interconex relied, pursuant to Colt instructions, upon "cargo summary sheets" prepared by Colt or its agents in calculating the charges billed to Colt and (b) the complaint fails to give a precise dollar figure of the total damage sought, are clearly inappropriate on a motion to dismiss the complaint since they involve issues of fact. Colt contends that full investigation, discovery and the hearing will determine the precise amount of the overcharges. As to the amount of damages Colt says that its inability to state the amount more precisely reflects the difficulty of completing the investigation of complex documents on 379 different transactions, and the unavailability of information which is in the possession of Interconex or other persons. Colt says the precise amount of the damages inflicted by Interconex can only be determined after completion of discovery and Colt's own investigation.

On July 8, 1975, Sea-Land served (filed July 10, 1975) its answer to the complaint and included a motion for dismissal of the complaint. On July 10, 1975, AEL and U. S. Lines, served and filed Motions to Dismiss the complaint.

By notice served July 29, 1975, the time within which complainant could reply to the motions to dismiss the complaint was extended to August 14, 1975.

On August 12, 1975, Colt served (filed August 13, 1975) Replies to the motions to dismiss of Sea-Land, AEL and U. S. Lines.

Sea-Land in its motion for dismissal argued that each bill of lading issued by it shows the shipper to be Interconex and the consignee to be a Major General Yoo San Suk,Pusan, Korea;

that Colt does not appear as a party in the contract of carriage, nor is there any indication that Interconex was acting as an agent. Sea-Land stated that all bookings for vessel space and other arrangements with it for transportation were made by Interconex who was billed as the shipper and all payments were received from Interconex; that in no instance was the transportation arranged for or made by Colt.

Sea-Land contends that the transportation was an arrangement entirely and exclusively between Interconex and Colt.

AEL in its motion to dismiss the complaint asserts that Colt's claim is time-barred, in that the complaint was filed later than two years after the alleged cause of action accrued; that the claim is barred by the *Kraft* doctrine and that there is no relationship between Colt and AEL which could, under any circumstances, create or sustain an overcharge claim or complaint, that no action of AEL had an impact upon Colt.

U. S. Lines in its motion to dismiss the complaint contends, *inter alia,* that without alleging the existence of any relationship between Colt and U. S. Lines, the complaint names U. S. Lines as a respondent and the only allegations are made with respect to charges billed by Interconex; there is no contract of carriage between Colt and U. S. Lines, that there is no allegation that the shipments were misdescribed or the bills of lading issued by U. S. Lines to Interconex as opposed to the bills of lading issued by Interconex to Colt.

Colt replied to all of the motions to dismiss and except as indicated above as to Interconex's motion, argued as to all of the motions, *inter alia,* that this is a proceeding under Section 22 of the Shipping Act, 1916; that Colt seeks the enforcement of the Act to protect the interests of a foreign government and to assure that government that it will be able to rely on the integrity of American carriers, freight forwarders and NVOCC's regulated by the Federal Maritime Commission. Colt argues that the motions to dismiss assert that Colt as agent for the Republic of Korea is powerless to take any steps on behalf of its principal to protect its interests in these proceedings; that conceptions of privity of contract should permit the shipping lines to retain substantial amounts of money which they obtained at the expense of Colt's principal and to which they clearly are not entitled. Colt urges that none of the grounds asserted for dismissal by the ocean carriers has any merit.

Colt asserts that it is entitled to claim against the ocean carriers, on its own behalf, and also on behalf of the Government of the Republic of Korea, as the only appropriate party to force both Interconex and the ocean carriers to return the funds to which they are not entitled. In support of its theory of unjust enrichment Colt cites the Restatement of Restitution and makes an analogy to a proceeding in Admiralty as to the rights of a consignee and argues the right of the

Republic of Korea under the provision of Section 22 of the Act. Further Colt invokes principles of agency, and asks that the right and obligation of all parties be resolved in a full trial.

Colt also asserts that the two-year limitation provided in Section 22 of the Act and Rule 5(c) of the Commission's Rules was tolled by the fraudulent practices alleged in the complaint because it is a generally recognized rule of law that when fraud is practiced, statutes of limitation are tolled. Colt maintains that all of the facts pertaining to perpetration of the fraud and Colt's discovery of it are issues for trial.

As to the *Kraft* case, Colt states that even if *Kraft* should be read to apply to these circumstances, that Colt respectfully submits that the *Kraft* case was not rightly decided by the Commission, and endorsed the arguments made in the brief for the United States of America before the Court of Appeals.

Colt argues that the complaint, on the motions to dismiss, must be taken as true. That is correct as to well-pleaded material allegations of the complaint; such are taken as admitted, but conclusions of law or unwarranted deduction of facts are not admitted.

As has been indicated Colt seeks the enforcement of the Act to protect the interests of a foreign government and to assure that government that it will be able to rely on the integrity of American carriers, freight forwarders and NVOCC's regulated by the Federal Maritime Commission. Colt also seeks reparation. It well might be that the interests of all will be served best if the Commission upholds the dismissal of the complaint herein, and that the cause be removed to a court.

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The Commission, of course, has the power under Section 22 of the Shipping Act, 1916, to institute its own investigation of this matter for any violation thereof, and the imposition of penalties, if warranted, or the making of any adjustments indicated.

On July 10, 1975, Interconex served and filed an Answer and Counterclaim, alleging a violation by Colt of Section 16 of the Shipping Act, i. e., by means of unjust or unfair devices or means to obtain transportation by water of property at less than the rates or charges applicable; and the withholding of freight payments of $169,406.62 for a total damage to Interconex in the sum of $1,099,460.72, for which Interconex seeks reparation.

On August 6, 1975, Colt served (filed August 7, 1975) a reply to Interconex's counterclaim, and in defense argues there is no provision under the rules or regulations of the Commission for a counterclaim, invokes the statute of limitations of Section 22 of the Act as to bills of lading issued before June 5, 1973, and requests that the counterclaim be dismissed.

The counterclaim should be dismissed, because there is no provision for a counterclaim under the Commission's Rules and Regulations.

On August 15, 1975, Interconex served and filed a motion for oral argument to be heard on the motions to dismiss the complaint and the motion to dismiss the counterclaim against Colt and in support states, *inter alia,* that this proceeding involves complex, unusual and important legal issues and large sums of money, and that they can best be fully explored and brought into sharp focus by oral argument.

No comments have been received in favor of or against the motion for oral argument. However, as Interconex states in its motion, the issues have been set forth in the written pleadings. The granting of the motion to dismiss the complaint and counterclaim makes oral argument unnecessary. The motion for oral argument should be denied.

Colt in its reply to the motion of Interconex to dismiss, supports that reply by matters outside the pleadings, the affidavit of the Purchasing Manager of the Military Arms Division of Colt, and other material.

AEL in its motion to dismiss or in the alternative for summary judgment, supported it by matters outside the pleadings, the affidavit of one of its Senior Vice-Presidents.

Colt in its reply to the Motion of Sea-Land, AEL and U. S. Lines, to dismiss, also supported that by matters outside the pleadings, the affidavit of Colt's Director of Traffic, and other material.

To exclude all of the above matters outside the pleadings from consideration would be treating the motions as motions for summary judgment. That is not the case here. The motions to dismiss are well taken, and should, save for the many issues, be disposed of by summary judgment. There is no easy road for resolution of the many problems here about which genuine issues of material fact are raised by allegations of fraud, agents and undisclosed parties, because the indications are that there well might be a plethora, well beyond the jurisdiction of this Commission to deal with, and which should be pursued in a court, so that summary judgment is denied.

Wherefore, upon consideration of the above, and for the reasons given, it is this 5th day of September 1975,

Ordered,

(A) The motions of Interconex, Sea-Land, AEL and U.S. Lines respectively, to Dismiss the complaint be and hereby are respectively granted.

(B) The motion of Colt to dismiss the counterclaim of Interconex against Colt, be and hereby is granted.

(C) The motion of Interconex for Oral Argument, be and hereby is denied.

(D) This proceeding is discontinued.

William Beasley Harris

William Beasley Harris
Administrative Law Judge

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BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents

Docket No. 75-24

REPLY TO APPEAL FROM AN ORDER OF ADMINISTRATIVE LAW JUDGE DISMISSING THE COMPLAINT

Eldered N. Bell
Director, Regulatory Affairs

F. J. Hiljer
Commerce Manager

September 8, 1975

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant

v.

SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents

Docket No. 75-24

REPLY TO APPEAL FROM AN ORDER OF ADMINISTRATIVE LAW JUDGE DISMISSING THE COMPLAINT

Comes now Sea-Land Service, Inc. (Sea-Land) named respondent in the above docketed proceeding and submits this reply to the appeal to the Commission of Interconex, Inc., from the Order of Administrative Law Judge William Beasley Harris served August 15, 1975, dismissing the complaint and discontinuing this proceeding.

I. INTRODUCTION

On June 4, 1975 Colt Industries Operating Corp. instituted proceedings in FMC Docket No. 75-19 by filing a complaint for reparations against Interconex, Inc. (Interconex), Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U. S. Lines, Inc. (USL). The Colt complaint alleged that the cubic measurements and/or weights of certain cargo shipped by it from the United States to Korea during the period July 28, 1972 to February 5, 1975 were other than the measurements and/or weights stated on the Bills of Lading issued by Interconex. Interconex is a non-vessel operating common carrier by water (NVOCC). The complaint further alleged that the underlying carriers, including Sea-Land, received greater compensation than they otherwise would have received had the cargo been properly stated under existing tariffs.

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This, said Colt was in violation of Section 18 (b) (3) Shipping Act, 1916.

Interconex, Sea-Land, AEL and USL replied to the complaint, urging dismissal of said complaint. By Order served September 5, 1975, Administrative Law Judge William Beasley Harris duly dismissed the complaint in Docket No. 75-19.

In the interim, Interconex attempted to file a cross claim against the three carriers in Docket 75-24, to which the carriers timely replied urging inter alia that the Commission's rules did not provide for cross-claim actions and that the carriers were not a part of any misdescription of weight or measurement and had fully performed their responsibility of carriage to Interconex who, for purposes of the movements in question, was a shipper. Judge Harris dismissed the proceeding, first on August 11, 1975 on procedural grounds and secondly on August 15, 1975, on the basis of the submissions of the carrier respondents.

ARGUMENT

Now we have this appeal, an appeal that states or adds nothing to the original record other than to urge that Interconex has not been equitably treated by the Administrative Law Judge, casting dispersion on the Judge's actions simply because Interconex does not agree with the Judge's findings.

Sea-Land submits that Judge Harris has correctly ruled in this case.

Sea-Land has, as stated in previous documents, fully performed its duty to Interconex. We transported the cargo at the rates quoted by Interconex from its own tariff, not Sea-Land's. We delivered the cargo as required, without claim of damage or overcharge.

Now the shipper, Interconex, seeks to indemnify itself by involving Sea-Land in a problem of its own creation. If Interconex misstated weights and measurements, Sea-Land was not a party to that misstatement. Sea-Land could not and would not know of any misstatements becuase it was forced to rely upon the representations of the shipper. Accordingly, Interconex should not be allowed to indemnify itself as against Sea-Land for its own errors or misdeeds.

This case is exclusively a problem between Interconex and Colt, and does not involve the carrier at all; and, since the Law Judge has by his recent order of September 5, 1975, dismissed that action (Docket 75-19) this case cannot survive. In fact, Interconex in its appeal at Page 6 says:

> "Possibly the Colt Case against ICX will be decided in a way which renders the ICX complaint moot--in which case the ICX complaint can be dismissed or withdrawn--"

We would urge that while the issue in 75-19 has not moved fully through the Commission, the precedent there sufficient to dismiss this case.

Contrary to Interconex appeal, there is no status quo to be maintained, the cross claim cannot stand because there are no provisions for it in the applicable Law and Sea-Land should not be subject to having this type of action hanging over its operations when it did nothing to incur even a hint of liability.

Wherefore, for the reasons stated above and in previous pleadings in this case, Sea-Land strongly urges the Administrative Law Judge's decision of August 15, 1975 dismissing the complaint in the above docketed case, be affirmed.

Respectfully submitted,

Eldered N. Bell
Director, Regulatory Affairs

F. J. Hiljer
Commerce Manager

VERIFICATION

STATE OF NEW JERSEY)
) ss:
COUNTY OF MIDDLESEX)

Eldered N. Bell, being first duly sworn on oath deposes and says that he is Director, Regulatory Affairs, Sea-Land Service, Inc., and is the person who signed the foregoing answer and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

Eldered N. Bell

Subscribed and Sworn to before me, a notary public in and for the State of New Jersey, County of Middlesex, this 8th day of September, A.D. 1975.

Dorothy Vecchiarelli

DOROTHY VECCHIARELLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 15, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on all parties of record by First Class Mail postage prepaid this 8th day of September, 1975.

Eldered N. Bell

Before the
FEDERAL MARITIME COMMISSION

Docket No. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC.
UNITED STATES LINES, INC.

REPLY OF AMERICAN EXPORT LINES, INC. TO APPEAL OF INTERCONEX, INC. FROM AN ORDER OF ADMINISTRATIVE LAW JUDGE DISMISSING ITS COMPLAINT

Comes now respondent American Export Lines, Inc. (AEL), by its attorneys, and hereby replies to the appeal of Interconex, Inc. (Interconex) from an Order of the Administrative Law Judge dismissing its Complaint. Interconex's present appeal is from the twin Orders of the presiding Administrative Law Judge dated August 11 and 15, 1975 both of which granted motions to dismiss the conditional Complaint of Interconex which is completely without merit and to discontinue the proceeding. The appeal should be denied.

I.

Interconex's Claim Is Procedurally Deficient and Factually Unfounded

After, as we understand it, an earlier abortive effort to lodge a complaint with the Secretary, Interconex on June 24, 1975 succeeded in filing its complaint in the nature of a cross-claim (which, as far as we are aware, and as found by the Law Judge, is not provided for by the Commission's Rules) in the above-referenced docket which was served on AEL on July 2, 1975. The complaint annexes and makes a part thereof the complaint in Docket 75-19 in which Interconex is a respondent, Colt Industries Operating Corp. v. Interconex, et al., and alleges that the three respondent ocean common carriers will or may be required to indemnify Interconex and that the underlying carriers are or may be liable to Interconex for all or part of any reparations Interconex may be required to pay as a consequence of the complaint in Docket 75-19 and to toll the statute of limitations with respect to Interconex's claim, whatever it may be, against the three carrier respondents. This purported "complaint" for indemnification or whatever appears to be nothing more than a notification that a complaint for reparations may or will be filed if Colt should prevail in its action against Interconex in Docket 75-19. See Rule 5(c), 46 C.F.R. 502.63. 1/

1/ The Colt complaint in Docket No. 75-19 was dismissed by the Administrative Law Judge per Order served September 5, 1975.

Interconex's claim is procedurally deficient because it is vague, speculative, conjectural and does not allege any specific violation of the 1916 Shipping Act by any of the three common carriers by water, nor does it constitute an independent cause of action separate from Docket 75-19. It fails to allege that AEL breached its transportation contract with Interconex or any other duty owed by AEL to Interconex. The nebulous complaint does not set forth the specific relief on other affirmative action sought nor the factual details regarding such items as shipments, commodities, tariffs, and the amount of damage as required by Rule 5(b), 46 C.F.R. 502.62. In short, the complaint is so deficient that it should, as held by the Administrative Law Judge, be striken from the Commission's docket. At the very best, as contemplated by Rule 5(b), (and as acknowledged by Interconex, pp 9-10 of its appeal), Interconex would be required to amend the pleading in order to supply such particulars as to place it in at least faintly substantial compliance with the Commission's Rules of Practice and Procedure. It is clear however, from Interconex's appeal and other pleadings that it could not possibly cure the deficiencies in its complaint.

The Interconex "cross-claim" against AEL is particularly curious when it is judged in the context of the Affidavit of Nicholas D. Pasco, Senior Vice-President of AEL, given in connection [illegible] ket No. 75-19 and 75-24. This Affidavit, which is attached hereto and incorporated herein, states that on the one and only Interconex shipment on an AEL vessel reflected in Schedule A to the complaint in Docket No. 75-19, AEL billed its shipper Interconex the proper tariff rate of $3,514.50, whereas Interconex in turn billed its shipper Colt $4,281.76 (Affidavit, paragraph 4). There is no possibility whatsoever that AEL could be responsible to indemnify or pay reparation to Interconex in connection with the Colt complaint or with respect to Interconex's totally continegent claim since AEL did not overcharge anyone. Thus it appears as a certainty that Interconex is entitled to no relief from AEL.

II.

Interconex's Claim Is Time-Barred

Interconex's complaint for indemnification, reparations or damages in this docket was filed with the Commission on June 24, 1975. The one and only shipment on an AEL vessel reflected in Schedule A to the incorporated complaint in Docket 75-19 (138 A attached to the accompanying Affidavit of Nicholas D. Pasco, Senior Vice-President of AEL) states that the shipment of 81 drums of metal cutting oil and phosphate acid left Philadelphia on April 2, 1973 on the AEL vessel DEFIANCE. AEL assessed the normal Far East Conference rate in effect at the time of shipment and billed Interconex $3,960.00 based upon the information provided by the shipper's load and count. Subsequently, on May 4, 1973, AEL issued a manifest correction amending its billing down to the correct amount of $3,514.50 due to the fact that it discovered a project tariff rate that was applicable. The drums were discharged in Pusan on May 4, 1973 and Interconex paid the freight on May 16, 1973 (Affidavit, paragraph 4).

Pursuant to Section 22 of the Shipping Act, 1916, as amended, 46 U.S.C. 821, the Commission has authority to order reparation to any person who proves a complaint against a carrier, if the complaint is filed within two years after the cause of action accrued. Specifically, the statute provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby.
>
> ***
>
> The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation. (See, also, Rule 5(c) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.63.)

It is perfectly obvious from the Interconex complaint that Interconex has failed to state a claim upon which reparations can be granted because its complaint was filed later than two (2) years after the alleged cause of action accrued and accordingly the complaint must be dismissed as to AEL. Interconex has conceded the correctness of AEL's position by stating in its Reply to AEL's Motion to Dismiss below that:

> "If Colt prevails on its claim against it, ICX would be forced to return payments received with respect to all shipments, except those occurring before June 4, 1973, which would be barred by Section 22 of the Shipping Act. ICX's ability to recover the payments passed on to the underlying carriers is limited by Section 22 to those shipments occurring not more than two years before the date it filed its complaint, even though the same set of facts and legal theory as in the Colt complaint would exist." (pp 2-3)

Thus, Interconex's claim as to AEL is clearly time-barred.

III.

The Claim Is Barred by the Kraft Doctrine

A shipper, such as Interconex, is bound to the weight or cubic, measurement of the goods contained in the bill of lading when as here, reparation for overcharges based upon disputed weights or measurements, and the claim is not brought to the attention of the ocean carrier until after the time specified is an effective tariff rule.

In this respect Rule 9 of the Far East Freight Conference Tariff No. 25, FMC No. 5, in effect at the time of the one AEL shipment in question, provided that:

> Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

No such claim was presented to respondent AEL by complainant Interconex or anyone else prior to the filing of the instant complaint more than two (2) years after the cargo was delivered. (See Affidavit, paragraph 6, and Attachment D thereto.)

In Kraft Foods v. Moore-McCormack Lines, Inc., 14 SRR 603 (FMC, 1974), the FMC denied a claim for reparation for an alleged overcharge where the shipper failed to comply with the exact same tariff rule language, No. 16 of the South and East Africa Conference, providing that claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier before the shipment involved leaves the carrier's custody. In that case the majority held that reparation must be denied because the shipper failed to comply with the tariff rule. The Commission reasoned that Section 18(b)(3) of the

Shipping Act, which provides in pertinent part that,

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs...

makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions including therein, which are as much a part of the tariff as are the rates themselves. The FMC held that this valid tariff clause must be strictly applied by it and that "unless the shipper submits a claim involving contested weights or measurements prior to the shipment leaving the custody of the carrier (there Rule 16, here Rule 9) the merit in such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rules." (See also the recent Initial Decision in No. 75-15, The Carborundum Company v. Royal Netherlands Steamship Company.) The correctness of the decision is

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confirmed by the fact that unless the carrier is notified of such a claim of errors in weight or measurement before the cargo leaves its custody, it will be unable to verify the claimant's contentions (Affidavit, paragraph 6).

Accordingly, the claim must fall based upon the Commission's Kraft doctrine.

Conclusion

Wherefore, for the foregoing reasons [and particularly if the Commission's Rules are indeed to be applied in order to secure the just, speedy and inexpensive determination of every proceeding (Rule 1a, 46 C.F.R. 502.1; see, also, Rule 21(b), 46 C.F.R. 502.402)], the decision of the Administrative Law Judge that the complaint of Interconex should be dismissed as to AEL should be affirmed by the Commission.

Respectfully submitted,

KURRUS and JACOBI

By James N. Jacobi
JAMES N. JACOBI

2000 K Street, N. W.
Washington, D. C. 20006

September 9, 1975

Attorneys for Respondent
American Export Lines, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of September, 1975 served the foregoing Reply to Appeal upon all parties of record in this proceeding by mailing a copy to each such person via first-class mail, postage prepaid.

James N. Jacobi

Before the
FEDERAL MARITIME COMMISSION

DOCKET NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

City of Washington)
) ss:
District of Columbia)

NICHOLAS D. PASCO, being duly sworn, deposes and says:

1. I am a Senior Vice-President of American Export Lines, Inc., (AEL), an American-flag common carrier by water, with its principal place of business at 17 Battery Place, New York, New York 10004.

2. AEL was served with a complaint by Colt Industries, Inc. in the above-referenced docket on or about June 6, 1975 along with respondents Interconex, Inc. (Interconex), Sea-Land Service, Inc. (Sea-Land) and United States Lines, Inc. (USL) demanding reparations in a total amount presently estimated by Colt to be about

$500,000.00. The gravamen of the complaint is based upon an allegation that Interconex, as a non-vessel-operating common carrier by water, prepared ocean bills of lading in which the cubic measurements and/or calculation of weights of Colt cargo shipped from U. S. ports to Korea via Interconex were overstated, and that as a consequence Interconex received compensation in excess of that provided in its tariff. The Colt complaint also alleges that by reason of the alleged overstated measurements and/or weights, the three ocean carriers, i.e., Sea-Land, USL and AEL, received compensation in excess of that provided for by the Far East Conference tariff, and/or other applicable tariffs, and/or special project rates applicable to the shipments in question.

3. Under my direction and control, a careful check was made of Schedule A to the complaint, which comprises two exceedingly bulky volumes of shipping documents. This analysis located only one (1) shipment from Interconex in our service and indicates that 99% of the cargo was shipped via USL, less than 1% was shipped by Sea-Land, and AEL carried this one little shipment which probably represents less than one-tenth of 1% of the total involved.

4. Our examination of the documents indicates that on this one shipment transported on our vessel DEFIANCE out of Philadelphia on April 2, 1973 to Pusan, AEL carried 81 drums of metal cutting oil

and phosphate acid (see 138 A of Schedule A of the Complaint, copy enclosed as Attachment "A"). This cargo in drums was discharged Pusan May 4, 1973. We assessed the normal Far East Conference rate in effect at the time of shipment and thus we originally billed Interconex $3,960.00 based upon particulars provided by the shipper's load and count regarding this movement which was packed and sealed by the shipper. Subsequently, on May 5, 1973, we amended our billing down to the correct amount of $3,514.50 due to the fact that we discovered a project tariff rate that was applicable. Interconex paid the freight on May 16, 1973. Copies of our Bill of Lading No. 82468 and Manifest Correction No. 359-61239 are attached as "B" and "C" hereto. Colt is claiming that they were billed $4,281.76, by Interconex, which they paid on May 14, 1973 (see Attachment "A", items 21 and 24).

5. AEL was and is without privity with Colt and not a party to any arrangements made between Colt and Interconex, and what arrangements Interconex had with Colt via contract or tariff was not known to us. Our service was provided at the request of Interconex, and our Bill of Lading shows the shipper to be Interconex and the consignee to be Major General Yoo Sam Suk, Commanding General, 2d R.O.K. Arsenal, Pier #3, Pusan, Korea. Colt's name does not appear as a party, nor is there any indication that Interconex was acting as an agent for Colt, nor did we know that from any other source.

6. We are frankly quite amazed that Colt would have the temerity to bring formal suit against AEL for this one shipment and embroil us in expensive and senseless litigation, particularly when neither it nor Interconex nor anyone else ever made a claim against us until the filing of the instant complaint. In this regard, the applicable Far East Conference tariff effective on the date of the one AEL shipment, Freight Tariff No. 25, FMC No. 5, 2nd Revised Page 104, effective May 27, 1970, Rule 9 (see Attachment "D") provides in pertinent part that -

> Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

No such notice of a challenge to the weights or measurements on which the charges were based was ever given to us. Since the shipment left our custody over two (2) years ago, AEL is prevented from verifying claimant's contentions and must of necessity be governed by the weights and measurements shown on the bill of lading for the transportation and the applicable, proper and lawful tariff rate which we used to bill Interconex.

Any complaint for reparations which Colt may have would be against Interconex and not AEL.

Nicholas D. Pasco
NICHOLAS D. PASCO
Senior Vice-President
American Export Lines, Inc.

Subscribed and sworn to before me this 10th day of July 1975.

Eileen F. Guthrie
Notary Public

My Commission expires Jan. 31, 1977

SCHEDULE A

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1. Carrier: American Export

2. Container Number: INTU 424249

3. Seal Number:

4. Name of Vessel: Defiance

5. Port of Loading: Philadelphia

6. Date Shipped from Loading Port: April 2, 1973

7. Port of Discharge: Pusan, Korea

8. Number/Date, Interconex B/L: 1 Interconex, Inc.

9. Number/Date, Ocean Carrier B/L:

10. Date Received at Discharge Point:

11. Purchase Order Number: K53639, K53705

12. Description of Commodity: 81 < 73 Drums Metal Cutting Oil
8 Drums Phosphate Acid

13. Weight: 38,361 lbs.

14. Measurement: 1980

15. Shipper Under Ocean Carrier B/L: Interconex, Inc.

16. Consignee Under Ocean Carrier B/L:
Major Gen. Yoo Sam Suk
Commanding General
National Defense Arsenal
Dong Re P.O.
I.P.O. Box 37, Pusan, Korea

17.	Shipper Under Interconex, Inc. B/L:	Interconex, Inc.
18.	Consignee Under Interconex, Inc. B/L:	Major Gen. Yoo Sam Suk Commanding General National Defense Arsenal Dong Re P.O. I.P.O. Box 37, Pusan, Korea
19.	Rate Applied by Interconex, Inc.:	1980 cu. ft. 80.25/40 cu. ft. 1980 cu. ft. 2.25/40 cu. ft.
20.	Rate applied by Ocean Carrier:	
✓21.	Charges Billed by Interconex, Inc.:	$4,281.76 ✓
22.	Charges Billed by Ocean Carrier:	×
23.	Interconex, Inc. Charges Paid by:	Colt Industries
✓24.	Interconex, Inc. Charges Paid by Colt Industries on:	May 14, 1973 Check # 17036
25.	Interconex, Inc. Charges Borne by:	The Government of the Republic of Korea
26.	Ocean Carrier's Charges Paid and Borne by:	Interconex, Inc.
27.	Ocean Carrier's Charges Paid by Interconex, Inc. on:	
28:	Charges that should have been Billed by Interconex, Inc.	
29.	Charges that should have been Billed by Ocean Carrier:	×
30.	Date Container Picked Up at Warehouse:	

AMERICAN EXPORT LINES INC.

, BR[illegible] WAY, NEW YORK, NEW YORK 10[illegible] U.S.

B

ER / EXPORTER
Intercontex, Inc.
22 East 6[illegible] Street,
New York, N. Y. 10021

DOCUMENT NO. 320

EXPORT REFERENCES

CONSIGNEE
ORDER OF
Major General Yoo San Suk-Commanding General
2nd R.O.K. Arsenal-
Pier #3
Pusan, Korea

FORWARDING AGENT- REFERENCES
Francesco Parisi, Inc. FMC # 770

POINT AND COUNTRY OF ORIGIN
U. S. A.

DOMESTIC ROUTING / EXPORT INSTRUCTIONS

ADDRESS ARRIVAL NOTICE TO
Major General Yoo San Suk-Commanding General
National Defense Arsenal-[illegible]
1 P. O. Box 37
Pusan, Korea

PIER
Packer Avenue Terminal

EXPORTING CARRIER (VESSEL)
Defiance

PORT OF LOADING
Philadelphia

ONWARD INLAND ROUTING

PORT OF DISCHARGE
Pusan, Korea

FOR TRANSSHIPMENT TO

CARRIER'S RECEIPT

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
	8300 ST/40	[illegible] SAID TO CONTAIN		
INFO 424263	1 –3 8000ST/4	[illegible]	38,3[illegible]	1980
		[illegible] 7145W/14 5T/40		
		[illegible]		
THESE COMMODITIES LICENSED BY U.S. FOR ULTIMATE DESTINATION PUSAN DIVERSION CONTRARY TO U.S. LAW PROHIBITED.		[illegible] R.O.K. [illegible]		

MILITARY CARGO

IN CONNECTION WITH FREIGHT, SEE CLAUSES 14 AND 16 OF THIS BILL OF LADING.

_____ @ _____ per 100 lbs. $ _____
_____ @ _____ per 2240 lbs. $ _____
1980 ft. ___ in. @ 80.00 per 40 cu. ft. $ 3,960.00
_____ kgs. @ _____ per 1000 kgs. $ _____
_____ cbm. @ _____ per cbm. $ _____
~~1980 74.00~~ ~~3,663.00~~
_____ $ _____
_____ $ _____
TOTAL $ 3960.00

IN ACCEPTING THIS BILL OF LADING, the Shipper, Consignee, Holder hereof, and Owner of the goods, agree to be bound by all of its stipulations, exceptions and conditions, whether written, printed or stamped on the front or back hereof, as well as the provisions of the above Carrier's published Tariff Rules and Regulations, as fully as if they were all signed by such Shipper, Consignee, Holder or Owner, and it is further agreed that Containers may be stowed on Deck, as per Clause 6.

IN WITNESS WHEREOF, the Master of the said vessel has affirmed to (Number) 3 bills of lading, all of this tenor and date, ONE of which being accomplished, the others to stand void.

By: AMERICAN EXPORT LINES, INC.
FOR THE MASTER

BILL OF LADING [illegible]
77
8-2468

DATED AT

TERMS OF BILL OF LADING CONTINUED ON REVERSE SIDE

REV 1051: 7/72

AMERICAN EXPORT ISBRANDTSEN LINES, INC. MANIFEST CORRECTIO

AS BILLED SHIPPER CONSIGNEE MARKS: INTERCONEX INC

PKGS	DESCRIPTION	WEIGHT	MEASURE	RATE	ITEMIZED AMT		TOTAL PREPAID		TOTAL COL
1	Container STC 73 drums cutting OIL 8 drums - Phosphoric ACID	38361	1980	80 00/M	3960	00	3960	00	321

BASIS FOR CORRECTION: PROJECT Rate APPLICABLE

AS CORRECTED SHIPPER CONSIGNEE MARKS

PKGS	DESCRIPTION	WEIGHT	MEASURE	RATE	ITEMIZED AMT		TOTAL PREPAID		TOTAL COL
	SAME AS ABOVE	38361	1980	71 00/M	3514	50	3514	50	

ADD TO MANIFEST		
DEDUCT FROM MANIFEST	(445 50)	(

FOR ACCOUNTING USE ONLY

ACCT CODE	DR		CR	

SAILING DATE	MO. 3 YEAR 73	ITEM NO. 1
VESSEL DiLuna	VESS VOY 47 25	SHIPPER # -
LOAD PORT Phila	PORT CODE 359	FORWARDER # 0770
DISCH PORT Pusan	PORT CODE 403	CERTIF Y
ULT PORT	PORT CODE	B 1
BILL OF LADING	B/L NO. 92462	

BROKER Francesco Parisi				REFERENCE NO.
STREET AND NO.				
CITY NEW YORK			STATE	
DATE 5/4/73	ISSUED BY SRB	OK	OK	OK

I CERTIFY THAT THE ADJUSTMENT TO THE MANIFEST AS NO
ABOVE IS TRUE AND CORRECT.

BY

1 – FREIGHT CASHIER
2 – STEAMER FILE
2 – PORT OF DISCHARGE
1 – CONFERENCE SECTION
2 – CONTROL PORTS
2 – OUTPORTS

1 – DOCUMENTATION
1 – STEVEDOR NO
1 – BROKERAGE CLERK
1 – ACCOUNTS RECEIVABLE
3 – ACCOUNTING

MANIFEST CORRECTION NO.
359 – 61239
AMERICAN EXPORT ISBRANDTSEN LINES, INC

9. OVERCHARGES

Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

All requests for remeasurements or reweighing at destination must be made in writing to the Conference by the carrier; however, such requests will not be considered if the goods shipped are covered by a Weight/Measurement Agreement, in which case the weights or measurements as shown in the agreement shall govern.

The results of such remeasurements or reweighing at destination are to be submitted to the Conference for such further handling as may be required with the carriers and/or the Cargo Inspecton Bureaus.

Any expenses incurred by the carrier or the Conference in connection with the investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant.

(C) All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after date of shipment. (Not applicable on shipments made in the name of United States Governmental Agencies.)

For purposes of uniformity in handling claims for excess weights or measurements, refunds will only be considered, as follows:

Excess Measurement

Where an error has been made by the dock in calculation of measurement.

Against remeasurement made at port of loading, prior to ship's departure.

Against remeasurement made by official measurers named by the Conference at destination.

Excess Weights

Upon submission of Certified Public Weigher's Certificate at port of loading.

Against reweighing by official weighers named by the Conference at destination.

(C) Change

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket 75-24

REPLY TO INTERCONEX APPEAL FROM ORDER DISMISSING COMPLAINT

Introduction

Pursuant to Rule 7(c) of the Commission's Rules of Practice and Procedure (46 CFR 502.74(a)) United States Lines, Inc. (USL) hereby Replies to the Interconex Appeal from the August 15, 1975 Order Dismissing the Complaint in Docket 75-24.

Procedural Background

On July 2, 1975 by a pleading purporting to be a "Complaint" Interconex (ICX) stated: "On information and belief [that] if Interconex is finally required to pay reparation to Colt [Colt Industries Operating Corp.] under or in consequence of the Colt Complaint in Docket 75-19, the underlying carriers -- respondents herein -- will or may be required to indemnify Interconex for all or a part of such reparation." (ICX Complaint, p. 3, para. 8).

Paragraph 9 of said "Complaint" states that it is filed "in the nature of a cross-claim against co-parties...on the ground that they are or may be liable to Interconex for all or a part of Colt's claim against it" [Interconex]. The prayer for relief requested that the Commission hear Interconex's charges against respondents in Docket 75-24 and that Interconex's "Complaint" be consolidated with the proceedings in Docket No. 75-19.

The Colt Complaint referred to by ICX was filed on June 15, 1975 against ICX, American Export Lines, Inc. (AEL), Sea-Land Service, Inc. (Sea-Land) and United States Lines, Inc. (USL). There Colt alleged that:

> "In preparing ocean bills of lading under its contractual obligation for such shipments Respondent Interconex, Inc. either fraudulently, negligently or by reasons of gross negligence and recklessness misstated the cubic measurements and/or calculation of weights of the shipments in question, as a consequence of which said Respondent [Interconex] charged, demanded, collected and received from Complainant compensation in excess of that proveded for by said Respondent's [Interconex's] published tariff...." (Colt Complaint, para. 8 -- Emphasis added).

> "By reason of the facts misstated by Interconex, Inc. alleged above, Respondents Sea-Land Service, Inc., American Export Lines, Inc. and United States Lines, Inc. as their several interests appear or shall appear...have received compensation for ocean carriage in excess of that provided for by the Far East Conference Tariff and/or other applicable tariffs...." Colt Complaint, para. 9 -- Emphasis added).

The relief sought by Colt in Docket 75-19 is that:

> "The Commission direct the payment to Complainant by Respondents, as their liabilities may appear, of full reparation for the unlawful charges hereinabove described in such sums as the Commission may determine to be proper as an award of reparation." (Colt Complaint, p. 6).

On July 22, 1975 USL filed a Motion to dismiss ICX's Complaint in Docket 75-24 on the legal grounds that it was both procedurally and substantively deficent, a contingent cross-claim, not permitted by the Commission's Rules of Practice and Procedure, unanswerable as a Complaint, and in the alternative was subject to dismissal under the rules of law set forth in Section 22 of the Shipping Act, 1916 (46 USC 821), Rule 5(c) of the Commission's Rules of Practice and Procedure (46 CFR 502.63), and Commission decisions (Kraft Foods v. Moore McCormack Lines, Inc. 14 SRR 603, (1974), and P.P.G. Industries, Inc. v. USL, 14 SRR 1657 (1975)).

Respondents Sea-Land, and American Export Lines also filed timely Motions to dismiss with supporting authorities. Complainant Interconex served replies to each of the Motions on August 6, 1975.

On August 11, 1975 the Presiding Officer served an Order reflecting his consideration and acceptance of the arguments and authorities advanced by Respondents' Motions to Dismiss the Interconex Complaint but indicated that Interconex had filed no replies thereto.

On August 12, 1975 Counsel for Interconex protested this circumstance to the Administrative Law Judge who undertook that same day to obtain copies of Interconex's replies.[1]

On August 15, 1975 after giving full consideration to the matters set forth in the Interconex replies, the Presiding Officer sua sponte entered an Order reconsidering the Respondents' Motions to Dismiss in view of Interconex's replies. The arguments and authorities advanced by the Respondents were again found dispositive after giving full consideration to those asserted by Interconex with the result that Interconex's Complaint was dismissed as without statutory support or authority and impermissible under the Commission's Rules of Practice and Procedure.

On the same day that the August 15th Order on reconsideration was served by mail, Interconex filed a Motion for Reconsideration of the August 6th Order with a request for Oral Argument and USL, prior to receipt of the August 15th Order, replied in opposition to the request for Oral Argument.

On August 25, 1975 Interconex served the Appeal here under consideration and to which USL hereby replies.

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[1] As recited in the Order served August 15, 1975 at p. 2.

I. THE COMPLAINT REMAINS PROCEDURALLY DEFICIENT

1.) It Has Not Been Properly Verified.

As was noted in USL's Motion to Dismiss, the ICX Complaint is procedurally deficient insofar as it has not been executed in accordance with Rule 8(b) of the Commission's Rules of Practice and Procedure (46 CFR 502.112(b)).

The "Verification" appended as page 5 of the Complaint fails to comply with the provisions of Rule 8(b) which, in the absence of a signature of an attorney to the Complaint, requires a verification by the party to accompany any complaint filed and that:

> "Where the signature is that of an officer or agent (unless, in the case of a corporate party, it is signed by the president or vice-president and attested by the secretary or an assistant secretary under the seal of the corporation) there shall be filed with the Commission an original or certified copy of the power of attorney or other document authorizing the person to sign."

Here Mr. Jon T. Stephens, President of Interconex, Inc. originally signed the Complaint and Verification but neither signature was "attested by the secretary or an assistant secretary under the seal of the corporation" nor was there any public record of a power of attorney or other document having been filed with the Commission as authority for Mr. Stephens to sign the Complaint or Verification.

On August 6, 1975 in replying to USL's Motion to Dismiss, ICX submitted "a substitute signature page, properly attested and sealed." (See ICX Reply, page 3 and attachment thereto).

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USL submits that no valid Complaint is yet on file with the Commission since ICX submitted only an attested signature page and no properly executed verification of its Complaint. The unattested verification attached to ICX's original Complaint does not purport to verify the allegations incorporated by reference from the Colt Complaint and it is this logical deficiency as well as the technical requirements of Rule 8(d)[2/] which prompts USL to bring this matter to the Commission's attention. In short, ICX has thus far sought to lodge a separate Complaint against USL for hundreds of thousands of dollars based upon allegations which ICX is unwilling or unable to subscribe to or verify in accordance with the provisions of Section 22 of the Shipping Act, 1916 as construed and implemented by Rule 8(d) of the Commission's Rules of Practice and Procedure.

This continuing defect requires a finding that the Complaint was void ab initio, should not have been accepted for filing and was properly dismissed.

2.) The FMC's Rules Of Practice And Procedure Do Not Permit Assertion Of A Contingent Cross-Claim By Way Of A Separate Complaint.

In replying to USL's Motion and again here on appeal, Interconex alleges that its Complaint is in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the

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[2/] 46 CFR 502.112(b) -- See USL Motion to Dismiss, pp. 2 & 3.

Federal Rules. It should first be observed that the FMC Rules of Practice and Procedure do not provide for such co-party cross-claims. Even with regard to the federal practice, 28 USC 13(g) clearly contemplates that such cross-claims by one party against a co-party will be stated in a pleading filed in the original action against such co-parties. The overriding significance of ICX's defective approach is demonstrated by the fact that Colt is not a party to the ICX Complaint (Dkt. 75-24). Without regard to this circumstance, ICX has blindly incorporated by reference the allegations contained in the Colt Complaint; thus leaving this proceeding without a party to come forward and offer proof with respect to those essential incorporated allegations. ICX defends its attempt to initiate a separate complaint by asserting "The inability of ICX to bring new defendants into the Colt case." (Appeal, p. 4). Since each of the three Respondents named in the ICX Complaint are named Respondents in the Colt case, the "new defendants" argument is simply contrary to the facts presented.

The ICX Complaint, if intended to state a separate cause of action by Interconex, as shipper, against USL, as carrier, is premature and procedurally defective. If, on the other hand, Interconex's Complaint is intended only to urge a contingent claim for indemnification, the institution of a separate Complaint proceeding is inappropriate, unwarranted, and not supported by either the FMC's Rules of Practice by analogy to Federal Rule 13(g).[3/]

[3/] See also MacMillan v. United Cargo Corp., 11 SRR 1143 (1970).

It should be further observed that had ICX sought to assert its claim for indemnification against the co-respondent vessel operators in Docket 75-19 (or if it seeks to do so upon denial of this appeal) it will have to be determined whether such a cross-claim can be sustained in view of the separate and distinct shipper/carrier relationships involved and the dissimilarities between Colt's allegations against ICX and Colt's allegations against the vessel operators.[4/]

In any event, Rule 13(g) of the Federal Rules relied upon by Interconex as well as the FMC's Rules of Practice and Procedure, do not permit the assertion of this alleged contingent cross-claim for indemnification as pleaded herein and dismissal of the Complaint in Docket 75-24 should be affirmed for the procedural defects recited above.

II. THE ISSUES HERE PRESENTED TURN ON THE ESSENTIAL CHARACTER OF ICX's COMPLAINT AND NOT THE NICITIES OF PLEADING

ICX argues on appeal that its Complaint satisfied "the office of a pleading under modern administrative and judicial concepts." (Appeal, p. 8). USL did not base its Motion to Dismiss on such subtleties nor did the Order Dismissing the Complaint turn on the vagueness and ambiguity of ICX's pleading. Instead, USL's Motion plainly demonstrated as incorrect Interconex's assertion

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[4/] For example, there is no contract of carriage between Colt and USL that has been alleged and only Interconex is alleged by Colt to have acted in a fraudulent and/or negligent manner. These substantial differences rebut ICX's argument on appeal that "if held liable to Colt in Docket 75-19, it [ICX] would have a similar claim for the same reasons against the underlying carriers." (Appeal, p. 2).

that its contingent claim for indemnification was analogous to a cross-claim against co-parties under Federal Rule 13(g) (28 USC 13(g)) and the Presiding Officer found that the FMC is simply without authority to proceed to adjudicate such a contingent claim under a separately filed complaint.

The essential deficiency of ICX's purported Complaint is that it does not state an independent and unconditional cause of action against USL.

III. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

1.) The Complaint Does Not Allege A Violation Of The Shipping Act And Does Not Seek Reparations.

Neither the text of the Complaint as filed by Interconex nor the underlying Complaint by Colt appended thereto states a cause of action against USL. The deficiencies in the Colt Complaint stem basically from the admitted facts that Interconex, not Colt, was the shipper who tendered the containers to USL and that Interconex (an NVOCC), not USL, was the carrier vis-a-vis Colt.

As for the ICX Complaint, this clearly fails to allege that USL violated any provision of the Shipping Act and seeks only contingent indemnification, not reparations, from USL. The comment that the Interconex Complaint was filed "on the ground that they [USL and the other vessel operators] may be liable to Interconex for all or part of Colt's claim against it..." (Complaint, para. 9 -- Emphasis added) discloses on its face that the Complaint does not state an integral or independent cause of action against USL.

The further assertion that the Complaint was filed "to toll the statute of limitations with respect to Interconex's claim [for Indemnification] against respondents" adds nothing and may not be allowed to accomplish that stated purpose since, unless and until Colt files an independent complaint against USL making the necessary verified allegations to state a cause of action under the Shipping Act arising out of a shipper/carrier relationship between Interconex and USL, Section 22 of the Act and Rule 5(c) will not have been satisfied. Here, Interconex's allegation that USL "may be liable to Interconex for all or a part of Colt's claim against [Interconex]" (Emphasis added) amounts to nothing more than: "Notification to the Commission that a Complaint may or will be filed for the recovery of reparations -- [an event which] -- will not constitute a filing within the two year period." (46 CFR 502.65).

2.) As A Matter Of Law Interconex Would Not Be Entitled To Seek Reparations From USL.

By way of incorporation of the Colt Complaint, Interconex has adopted for purposes of its Complaint in Docket 75-24 the allegations that Interconex misstated "the cubic measurements and/or calculations of weights of the shipments in question" (Colt Complaint, p. 4, para. 8) and that the shipments were made under the Far East Conference Tariff and other applicable tariffs. In these circumstances alleged via incorporation and deemed admitted by the Interconex Complaint, a claim for overcharges said to be attributable to such misstatements of cargo weights and measures cannot, as a matter of law, be the basis for a reparations Complaint by shipper Interconex against carrier USL at this late date.

During the time period covered by the Interconex Complaint (i.e. July 28, 1972 to February 5, 1975) Rule 9 of the Far East Conference Tariff No. 25 (FMC No. 5)[5/] at page 104 required that:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier...."

With respect to containers listed in Appendix A to Colt's Complaint as moving on USL's vessels from California to Korea, the Pacific Westbound Conference Local Freight Tariff No. 3 (FMC No. 8) was applicable for the period in question up until January 15, 1975 at which time it was cancelled and superceded by Pacific Westbound Conference Local Freight Tariff No. 4 (FMC No. 12). The former addressed such "overcharges" in Rule 53 at page 43 and the latter addressed such "overcharges" in Rule 53 at page 30. Both of these tariffs employ the same language as the Far East Conference Tariff and require claims "based on alleged errors in description, weight and/or measurement" to be presented in writing before the shipment leaves the custody of the carrier.

Language identical to that quoted above and applicable to the shipments involved in this proceeding was recently examined construed by the Commission in Kraft Foods v. Moore McCormack

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[5/] Cancelled by Far East Conference Tariff No. 26 (FMC No. 8), effective March 1, 1975 wherein the identical Rule 9 appears at p.126.

Lines, Inc., FMC Dkt. 73-44, 14 SRR 603 (1974), Petition For Re-Consideration Denied. There the Commission denied reparations for alleged overcharges based upon cargo mismeasurement "because the Complainant failed to comply with tariff Rule 16[6] and therefore [the Commission] need not consider whether Complainant did or did not sustain its burden of proof as to the correct measurement or weight of the shipment." (*Id.* at p. 605)

The Commission explained that there, as here:

> "Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.***
>
> Applying this mandate to the case before us, it can be seen that Moore McCormack had no alternative here but to comply with the rules of its tariff on file. *Therefore, in order that Kraft Food's claim be considered, it was required to furnish its claim to Moore McCormack prior to the time the shipment left Moore McCormack's custody*. The provisions of Rule 16 above are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or re-measuring be conducted in the custody of the carrier. *This rule represents a term and condition of the tariff on file to which the carrier has no choice but to adhere scrupulously*. *Because Kraft Foods did not comply with these terms, reparation here could not be granted*.
>
> This conclusion in no way restricts the right of any person to file a complaint pursuant to the provisions of Section 22 of the Shipping Act, 1916, within two years after the cause of action accrues. However, *unless the shipper submits a claim involving contested weight or measurement prior to the shipment leaving the*

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[6] The counterpart of Rules 9 and 53 in the conference tariffs involved here.

> custody of the carrier (Rule 16), the merit of any such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rates. In this case, the shipper should have sought re-weighing or re-measuring prior to the shipment leaving the custody of the carrier as required by Rule 16 of the Moore McCormack tariff." (*Id.* at 606 -- Emphasis added).

It is clear from this Commission decision that, as a matter of law, the Interconex Complaint is deficient on its face to the extent that it might be deemed to seek recovery of reparations (rather than indemnification) from USL based on disputed measurements of cargo weight and cube asserted long after the shipments in question have left the custody of USL. This failure to comply with the governing tariff rules concerning the presentation of such overcharge claims is a fatal defect requiring dismissal of the Interconex Complaint against USL.[7]

3.) Two-Year Statute Of Limitations Bars Any Claims For Reparations Or Indemnification As To Shipments Made After July 1, 1973.

In addition to the complete legal bar to seeking reparations (or indemnification) for errors in cargo weight and measure once the cargo has left the custody of the carrier, Interconex is further precluded from seeking reparations with respect to shipments made more than two years from the date of its Complaint under the general provisions of Section 22 of the Shipping Act (46 USC 821) and Rule 5(c) of the Commission's Rules of Practice and Procedure (46 CFR 502.63). As noted above, Interconex asked only for indemnification in its Complaint and did not state a cause of action or claim for reparations, but to the extent the Interconex filing might on appeal be deemed to constitute a Complaint for reparations it must be measured against the requirement that: "Complaints seeking reparation shall be filed within two (2) years after the cause of action accrues." (46 CFR 502.63).

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[7] See also the Commission order in *P.P.G. Industries, Inc. v. United States Lines, Inc.*, served April 8, 1975, 14 SRR 1657, and Judge Harris's recent decision in *Carborundum Co. v. Royal Netherlands S.S. Co.*, FMC Dkt. 75-15 (I.D. served August 19, 1975).

Since Interconex did not file its purported "Complaint" until July 2, 1975, no award (by way of reparation or indemnification) is possible with respect to shipments made on or before July 1, 1973 (i.e. shipments numbered 00001 through 00175 in Appendix A to the Colt Complaint.)

IV. ICX HAS FAILED TO OPPOSE, MUCH LESS REBUT, USL's SUBSTANTIVE ARGUMENTS AND AUTHORITIES FOR DISMISSAL.

In replying to USL's Motion to Dismiss and here, on appeal, Interconex has failed to argue against the substantive points and authorities cited by USL to support dismissal of ICX's Complaint. At page 6 of its Reply Interconex stated:

> "ICX takes no position, in this Motion, concerning the USL argument that the Kraft[2] rule precludes its claim for reparations 'based upon alleged errors in description, weight and/or measurement,' because ICX failed to present such claims to USL before the cargo involved left the custody of USL.
>
> [2] Kraft Foods v. Moore McCormack Lines, Inc., 14 SRR 603 (1974)"

* * *

> "ICX takes no position, in this Motion, on the USL argument that the two-year Statute of Limitations in Section 22 of the Shipping Act precludes reparations with respect to all shipments which occurred more than two years before the filing of its complaint."

ICX's decision to reserve its position on these two points of law could not have assisted the Presiding Officer in ruling upon USL's Motion to Dismiss,[8] and certainly did not rebut USL's authorities or obligate the Presiding Officer to expound upon ICX's lack of position in the Order of Dismissal.

Since the rule of law set forth in the Kraft case, construing and applying pertinent statutory provisions of the Shipping Act, 1916 and the FMC's Rules and Regulations, is alone sufficient grounds for dismissal of the ICX Complaint, Interconex cannot now avoid the consequences of its failure to oppose USL's arguments.

V. ANY CLERICAL ERROR IN THE INITIAL ORDER OF DISMISSAL WAS REMEDIED BY THE PRESIDING OFFICER's SUBSEQUENT SUA SPONTE RECONSIDERATION

In its Appeal Interconex trys to fault the Presiding Officer's ultimate Order of Dismissal by continued reference to the initial Order of Dismissal. In so doing, ICX fails to note that its counsel protested the initial Order of Dismissal on August 12, 1975 and that the Presiding Officer immediately undertook to obtain and review copies of the Replies filed by Interconex.[9] ICX incorrectly asserts on appeal that it was "forced to move for reconsideration" and that the August 15th Order upon sua sponte reconsideration is somehow less effective than if it had been issued after ICX's written protest and request for reconsideration. The Order appealed from clearly reflects deliberate consideration and rejection of the arguments advanced by ICX in opposition to the Motions to Dismiss in such a fashion as to remedy any clerical error which might have made the August 6th Order subject to challenge and ICX received the precise relief it sought -- namely, reconsideration.

---

[8] Also, ICX's reference, at page 2 of its August 6, 1975 Reply to arguments said to be contained in its "Motion to Dismiss the Complaint" [i.e. Dkt. 75-19], was of no assistance to the Presiding Officer since ICX did not serve that Motion to Dismiss the Colt Complaint until 6 days later.

---

[9] As stated at page 2 of the August 15th Order:

> "On August 12, 1975, one of the counsel for Interconex, Inc. came to the office of the presiding Administrative Law Judge protesting that Interconex had filed the replies to the motion within the time called for in the rules; that counsel had brought copies to the Commission on August 6, 1975, but not the required number of copies....On August 12, 1975 copies of Interconex's Replies were received in the office of the presiding Administrative Law Judge."

WHEREFORE: United States Lines, Inc., for the reasons stated above and based on the authorities cited herein and in its Motion to Dismiss, respectfully requests that the Interconex Appeal from the Order of Dismissal in this matter be denied.

Respectfully submitted,

Dated: September 12, 1975

Russell T. Weil

James P. Moore

Attorneys for
United States Lines, Inc.

KIRLIN, CAMPBELL & KEATING
900 17th Street, N. W.
Washington, D. C. 20006
202-296-4911

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply have been served upon all parties of record to this proceeding by First Class mail, postage prepaid, this 12th day of September, 1975.

James P. Moore

S E R V E D
SEPTEMBER 15, 1975
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

340

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of counsel for various parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is enlarged to and including October 15, 1975.

By the Commission.

Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

SERVED
OCTOBER 10, 1975
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U.S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of counsel for various parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including November 14, 1975.

By the Commission.

Francis C Hurney
Francis C. Hurney
Secretary

(SEAL)

RMcG, GFG

J. WARD O'NEILL
BERNARD D. ATWOOD
JAMES M. ESTABROOK
EDWARD H. MAHLA
JOHN C. MOORE
MacDONALD DEMING
JOHN OSNATO, JR.
WILLIAM J. JUNKERMAN
GORDON W. PAULSEN
M. E. DeORCHIS
WILLIAM P. KAIN, JR.
DAVID P. H. WATSON
RICHARD G. ASHWORTH
EDWARD L. JOHNSON
RICHARD B. BARNETT
MAURICE L. NOYER
SANFORD C. MILLER
CHARLES S. HAIGHT, JR.
FRANCIS X. BYRN
THOMAS R. H. HOWARTH
STEPHEN K. CARR
WALTER E. RUTHERFORD
R. GLENN BAUER
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HOLLIS M. WALKER, JR.
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November 6, 1975
Hand-Delivered

342

Hon. Francis C. Hurney
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Room 11101
Washington, D.C. 20573

RE: FMC DOCKET 75-19
Colt Industries Operating Corp. v. Interconex, Inc. et al
Our ref: 4738-1

Dear Mr. Hurney:

By order served on October 10, 1975, the Commission enlarged the time, to and including November 14, 1975, of the several parties to this proceeding to file an appeal from the September 5, 1975 order of dismissal. That was the first such extension requested by the parties.

The reason given for the original request for an extension of time was that the principal parties to the controversies had been discussing the possibility of settlement.

Since the time of that initial extension of time, counsel for those principal parties, Colt Industries Operating Corporation and Interconex Incorporated, have continued to confer concerning this case. We are also advised that discussions have taken place between counsel for Interconex and the respondent, Ocean Carriers. We are now able to represent to the Commission that additional progress toward settlement has been made. Indeed, we expect to receive shortly from counsel for Interconex a firm offer of settlement, and the draft of a proposed settlement agreement.

However, in view of the necessity to obtain the instructions of foreign principals, and the necessity of further considering the text of appropriate closing documents, it is apparent that a further extension of time within which to file an appeal will be necessary.

In these circumstances, it is respectfully requested, on behalf of both Colt and Interconex, that the time within which any party may appeal the September 5, 1975 order of dismissal be enlarged to and including December 15, 1975.

Respectfully,

HAIGHT, GARDNER, POOR & HAVENS

BY Charles S. Haight Jr.
Charles S. Haight, Jr.

CSH Jr./dg
ccs: Galland, Kharasch, Calkins & Brown
Kirlin, Campbell & Keating
Kurrus & Jacobi
Sea-Land Service, Inc.

S E R V E D
NOVEMBER 18, 1975
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

343

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of counsel for various parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including December 15, 1975.

By the Commission.

Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

(SERVED)
(DECEMBER 5, 1975)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of counsel for various parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including January 15, 1976.

By the Commission.

Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

(SERVED)
(JANUARY 14, 1976)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of counsel for various parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including February 17, 1976.

By the Commission.

Francis C. Hurney
Francis C. Hurney
Secretary

(SEAL)

JA 15

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④ JJ - File.

(S E R V E D)
(FE[illegible]ARY 18, 1976)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

346

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request for various parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including March 15, 1976.

By the Commission.

Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

KMcG

(SERVED)
([illegible]CH 19, 1976)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

347

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of the parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including April 5, 1976.

By the Commission.

Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

ORIGINAL

(S E R V E D)
(APRIL 7, 1976)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

NO. 75-19

COLT INDUSTRIES OPERATING CORP.,
ON ITS OWN BEHALF AND AS AGENT FOR THE
GOVERNMENT OF THE REPUBLIC OF KOREA

v.

INTERCONEX, INC., SEA-LAND SERVICE, INC.
AMERICAN EXPORT LINES, INC., AND U. S. LINES, INC.

FURTHER ENLARGEMENT OF TIME TO FILE APPEAL

Upon request of the parties to this proceeding, and good cause appearing, time within which appeal of the September 5, 1975 order of dismissal may be filed is further enlarged to and including April 26, 1976.

By the Commission.

Francis C. Hurney
Secretary

(SEAL)

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NEW YORK OFFICE
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JOSIAH K. ADAMS, JR.
COUNSEL

April 28, 1976

Hon. Francis C. Hurney
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D. C. 20573

Re: Colt v. Interconex, FMC Docket No. 75-19

Dear Mr. Hurney:

As you know, Colt's complaint in Docket 75-19 against Interconex, Sea-Land, U.S. Lines and American Export Line (filed on its own behalf and as agent for the Republic of Korea) and Interconex's counterclaim against Colt were dismissed by Administrative Law Judge William Beasley Harris' order of September 5, 1975. On April 26, 1976, the deadline for appealing that order expired, without any party to the proceeding having filed an appeal.

As for Colt, the Republic of Korea and Interconex, the basis for their decisions to refrain from appealing is a settlement agreement whereby Colt and the Republic of Korea release Interconex from the claims contained in the Colt complaint, and Interconex releases Colt and the Republic of Korea from the claims contained in its counterclaim, enclosed for your information. Since this settlement agreement discloses confidential relationships between Interconex and its shippers and proprietary information, we request that the agreement be granted confidential treatment, pursuant to Rule 10(aa) of the Commission's Rules of Practice and Procedure. We understand that Colt and the Republic of Korea may also exchange releases with certain of the other parties in this proceeding.

Sincerely,

Robert L. McGeorge
Attorney for Interconex, Inc.

RLMcG:js
Enclosure

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant,

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents.

Docket No. 75-24

MOTION OF INTERCONEX, INC. TO FILE AN OTHERWISE UNAUTHORIZED DOCUMENT

Pursuant to Rule 1(j) of the Commission's Rules of Practice and Procedure (46 CFR § 502.10), Interconex, Inc. (ICX) moves that the Commission accept the attached supplement to its brief appealing Administrative Law Judge William Beasley Harris' order dismissing its complaint in the above-captioned proceeding. The supplement to the ICX appeal brief is submitted for the sole purpose of notifying the Commission that a recent decision of the Court of Appeals for the District of Columbia Circuit -- rendered after the filing of all briefs in this appeal -- has reversed a Commission decision relied upon by the Administrative Law Judge in his order. It does not advance any new legal positions.

Under these circumstances, ICX believes that any Commission rules ordinarily prohibiting the filing of supplemental briefs should be waived, and that the attached supplemental brief should be placed into the record of this proceeding.

Respectfully submitted,
Robert L. McGeorge

GEORGE F. GALLAND
ROBERT L. McGEORGE
Galland, Kharasch, Calkins & Brown
1054 Thirty-First Street, N.W.
Washington, D. C. 20007

Attorneys for Interconex, Inc.

July 22, 1976

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BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant,

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents.

Docket No. 75-24

SUPPLEMENT TO THE INTERCONEX, INC. APPEAL FROM AN ORDER OF THE ADMINISTRATIVE LAW JUDGE DISMISSING THE COMPLAINT

GEORGE F. GALLAND
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1054 Thirty-First Street, N.W.
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Attorneys for Interconex, Inc.

July 22, 1976

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant,

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U. S. LINES, INC.,

Respondents.

Docket No. 75-24

SUPPLEMENT TO THE INTERCONEX, INC. APPEAL FROM AN ORDER OF THE ADMINISTRATIVE LAW JUDGE DISMISSING THE COMPLAINT

On June 24, 1975, Interconex, Inc. (ICX) filed a complaint against Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL), initiating the above-captioned proceeding. That complaint incorporated by reference the complaint in Colt Industries Operating Corp. v. Interconex, et al. (Docket No. 75-19) and alleged that, if ICX (a nonvessel operating common carrier by water) were required to return alleged overcharges to its shipper (Colt), the underlying carriers which transported those shipments (respondents Sea-Land, AEL and USL) would be required to indemnify ICX for all or part of such payment.

Each of the respondents moved to dismiss the ICX complaint; two relied heavily upon identical tariff rules stating that:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier." USL Motion at 6-9 (July 22, 1975); AEL Motion at 5-7 (July 22, 1975).

This type of tariff rule came to be known as the Kraft rule after the Commission upheld it in Kraft Foods v. Moore McCormack Lines, Inc., 14 SRR 603 (1974).

In his order dismissing the complaint, served August 11, 1975, Judge Harris recited the arguments advanced in each of the respondents' briefs, including their reliance upon the Kraft rule, and in the "discussion" portion of the order, "concluded that the above motions appear to be well-founded and should be granted." Order at 3. In his order upon reconsideration, served August 15, 1975, Judge Harris recited the arguments advanced by ICX in opposition to respondents' motions to dismiss, and ruled that:

> "[U]nder the position and arguments taken in the motions to dismiss, as opposed to those in the replies now considered, the dismissal of the complaint seems warranted." Order at 4.

The Court of Appeals for the District of Columbia Circuit recently overturned the Kraft rule. A copy of that decision, Kraft Foods v. Federal Maritime Commission, No. 75-1004 (D.C. Cir., July 13, 1976), is attached to this supplemental brief.

Neither Judge Harris' original order nor his order upon reconsideration specified which of respondents' arguments forms the basis of his decision to dismiss the ICX complaint. It appears, however, that he placed heavy reliance upon the Kraft rule.

ICX believes that the Court of Appeals decision in the Kraft case undermines the only possible basis for upholding Judge Harris' order, and that it should therefore be reversed.

ICX renews its request for oral argument in this proceeding.

Respectfully submitted,

Robert L. McGeorge

GEORGE F. GALLAND
ROBERT L. McGEORGE
Galland, Kharasch, Calkins & Brown
1054 Thirty-First Street, N.W.
Washington, D. C. 20007

Attorneys for Interconex, Inc.

July 22, 1976

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplement to the Interconex Appeal and Motion to File an Otherwise Unauthorized Document were served upon each of the parties of record by first class mail this 22nd day of July, 1976.

Robert L. McGeorge

Robert L. McGeorge

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1004

KRAFT FOODS, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the
Federal Maritime Commission

Argued October 28, 1975

Decided July 13, 1976

William Levenstein, for petitioner.

William H. Smith, Jr., Attorney, Federal Maritime Commission, with whom *James L. Pimper*, General Counsel and *Edward G. Gruis*, Deputy General Counsel, Federal Maritime Commission, were on the brief for respondent, Federal Maritime Commission.

Howard E. Shapiro and *Robert J. Wiggers*, Attorneys, Department of Justice, were on the brief for respondent

United States of America. *Carl D. Lawson*, Attorney, Department of Justice, also entered an appearance for respondent, United States of America.

Before: BAZELON, *Chief Judge*, HASTIE,* *Senior Circuit Judge* for the Third Circuit and ROBB, *Circuit Judge*

Senior Circuit Judge HASTIE participated in the consideration of this case but died before an opinion was entered.

Opinion for the court filed by *Circuit Judge* ROBB.

ROBB, *Circuit Judge*: This is a petition to review a report and order of the Federal Maritime Commission denying a claim by Kraft Foods for reparation from Moore-McCormack Lines, Inc. The claim was for alleged overcharges on a prepaid shipment from New York to Mombasa, Kenya. The shipment, consigned to Supermarket, Ltd., Nairobi, consisted of 112 cases of noodle dinners, spaghetti dinners and marshmallows, and was carried by Moore-McCormack, Inc. The shipment arrived at Mombasa February 3, 1973, and between that date and February 10 was unloaded and accepted by Supermarket, Ltd. Transportation charges were based upon a measurement of 284 cubic feet, shown on the reverse side of the dock receipt and on the bill of lading. On February 12, 1973, after receiving the shipment, Supermarket, Ltd., notified Kraft Foods that the freight had apparently been overcharged. On February 23, 1973 Kraft Foods notified Moore-McCormack of the apparent overcharge and contended the true measurement of the shipment was 145.01 cubic feet. Moore-McCormack responded that the charges were correct and that in any event the claim was out of time under the applicable tariff rule, known as Tariff Rule 16.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

An administrative law judge denied reparation on the ground that Kraft Foods had failed to sustain its burden of proof on the merits of its claim. On review the Commission, one member dissenting, did not reach the merits but denied reparation on the ground that claim was barred by Moore-McCormack's Tariff Rule 16. So far as pertiennt that rule (South and East Africa Conference South Bound Freight Tariff No. 1, F.M.C. No. 2, Original Page 110) provides in part:

> 16. OVERCHARGES
>
> Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier.

On this petition for review Kraft Foods is joined by the Department of Justice in challenging the validity of Tariff Rule 16. We think they are right.

Section 22 of the Shipping Act, 46 U.S.C. § 821 provides:

> Any person may file with the Federal Maritime Commission a sworn complaint setting forth any violation of this chapter . . . and asking reparation for the injury, if any, caused thereby . . . . The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

Applying this statute the Commission has consistently held unenforceable tariff rules which require a shipper to give notice of claim, to submit claims, or to commence formal proceedings within some period less than the two years provided in section 22. Such rules are known as "six-month rules" because the period of limitation has usually been six months. As the Commission in its brief acknowledges six-month rules are unenforceable "because they infringe on the right granted by Section 22 to obtain relief by commencing an administrative proceeding by sworn complaint within two years of the alleged Shipping Act violation." (Br., pp. 13-14) *See Proposed Rule Covering Time Limit on the Filing of Overcharge Claims,* 12 F.M.C. 298, 302 (1969); 10 F.M.C. 1 (1966); *Polychrome Corp. v. Hamburg-America Line—North German Lloyd,* 15 F.M.C. 221 (1972). We agree with this conclusion of the Commission.

The Commission argues that Rule 16 is only a "reasonable attempt to eliminate a prime cause of dispute as to weight or measurement" and to allow "carriers a degree of protection from false claims without imposing any unusual burden on shippers or consignees." (Br., pps. 8, 12) "The differences between a six-month rule and Rule 16" says the Commission, are so apparent that "lengthy discussions are unnecessary"; "Rule 16 does not in any way limit or condition the two-year period in which a shipper may bring a Section 22 action." (Br., pp. 14, 15)

We are unable to perceive the distinctions which the Commission finds so obvious and material. True, Rule 16 does not prevent the filing of a claim for reparation based on rates or measurements, but it does require that such a claim must be rejected unless presented to the carrier before the shipment leaves its custody. The right to file a claim becomes illusory once the carrier has delivered the shipment. In effect therefore the Rule sets up as a period of limitation the time during which the shipment remains in the custody of the carrier. We think this limitation, like the six-month rule, infringes on the rights granted by section 22 of the Shipping Act.

In its opinion rejecting the Kraft claim the Commission reasons that (1) Rule 16 is part of the Moore-

McCormack tariff; (2) section 18(b)(3) of the Shipping Act, 46 U.S.C. § 817(b)(3) requires a carrier to adhere strictly to the terms of its tariff as filed, and (3) therefore Moore-McCormack had no alternative but to comply with its tariff. The flaw in this syllogism is of course that Rule 16, conflicting as it does with section 22 of the Shipping Act, is not a valid tariff provision.

The order of the Federal Maritime Commission is vacated and the case is remanded for further proceedings on the merits of the Kraft claim.

So Ordered.

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BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,
Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents

Docket No. 75-24

MOTION TO DISMISS INTERCONEX's APPEAL FROM THE ORDER OF DISMISSAL

Pursuant to Rule 5(m) of the FMC's Rules of Practice and Procedure (46 CFR 502.73) Respondent, United States Lines, Inc. hereby moves to dismiss the Appeal of Plaintiff Interconex, Inc. (ICX) from the outstanding Order of Dismissal in this proceeding as moot and superseded by the events described below.

ICX IN DOCKET 75-24 ASSERTS A CONTINGENT CLAIM FOR INDEMNIFICATION AGAINST USL.

As repeatedly asserted and admitted by the Plaintiff ICX, its Complaint in Docket 75-24 was not filed as, or intended to be, a cause of action independent of the Complaint in

Colt Industries Operating Corp. v. Interconex, Inc. et al., FMC Dkt. 75-19 which was annexed to and made a part of the ICX Complaint.

Paragraph 8 of ICX's Complaint in Dkt. 75-24 alleges:

> "On information and belief, if Interconex is finally required to pay reparation to Colt under or in consequence of the Colt Complaint in Docket 75-19, the underlying carriers - respondents herein - will or may be required to indemnify Interconex for all or a part of such reparation;"

ICX's prayer for relief was also conditioned on the event that:

> "...if after hearing Colt's complaint in Docket No. 75-19 the Commission orders Interconex to pay reparation to Colt, it also orders those underlying carriers to pay reparation to Interconex in such amount as may be due..."

In reply to USL's Motion to Dismiss, ICX admitted that:

> "ICX adopted the allegations and arguments raised by Colt in Docket 75-19 and incorporated them by reference in its complaint against the underlying carriers in Docket 75-24."

* * *

> "ICX incorporated the Colt complaint by reference, but did not charge any other violations of the Shipping Act, because it intended to charge USL with exactly the same violations charged by Colt - no more, no less."

* * *

> "ICX believes that the term 'indemnification' adequately describes the nature of its complaint against USL...the purpose of the ICX complaint is clear - if the facts alleged by ICX (by way of incorporating Colt's complaint

> in Docket 75-19 by reference) are true, ICX demands that USL return over payments to it."[1]

Most recently in its appeal from the Presiding Officer's Order of Dismissal, ICX reiterated its qualified position that:

> "...if held liable to Colt in Docket 75-19, it [ICX] would have a similar claim for the same reasons, against the underlying carriers."[2]

* * *

> "Since the Commission's rules do not provide for third party procedure, ICX did not try to invoke it in the Colt case (Docket 75-19). Rather, it started a new case - this case - to assert a claim, as an NVO against the underlying carriers if Colt should prevail against ICX in Docket 75-19."

* * *

> "...ICX cannot know before the Colt case is decided whether it will have a good claim against its underlying carriers if Colt wins its own case. In any event, ICX has no reason to make any unconditional claim against the underlying carriers unless it is held liable to Colt..."
>
> "The plain truth is that there is no need even to pass on the motion to dismiss until the Colt case is decided."

* * *

> "Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot - in which case the ICX complaint can be dismissed or withdrawn."[3]

1/ Reply of Interconex, Inc. To Motion to Dismiss by United States Lines, Inc. filed August 6, 1975 at pp. 4, 5.

2/ Interconex's Appeal from an Order of Administrative Law Judge Dismissing the Complaint, filed August 25, 1975 at p. 2.

3/ Id. at pp. 4, 6 and the footnote on p. 10.

The interdependence of ICX's contingent claim for indemnification in Docket 75-24 upon the Colt complaint in Docket 75-19 is clearly demonstrated by the above excerpts from ICX's own pleadings.

THE UNDERLYING COMPLAINT PROCEEDING IN DOCKET 75-19 HAS BEEN TERMINATED.

The Order Dismissing the Complaint in Colt Industries Operating Corp. v. Interconex, Inc., et al. was served on September 5, 1975. That Order granted the relief which Interconex, Inc. had sought by its own Motion filed August 15, 1975.[4/]

At the request of counsel for Colt and/or the Republic of Korea and Counsel for Interconex the deadline for filing an appeal from the Presiding Officer's September 5, 1975 Order of Dismissal was progressively extended from September 15, 1975 to December 15, 1975, to January 15, 1976, to February 15, 1976 and finally to April 26, 1976 based upon representations that the parties to Docket 75-19 were actively exploring a possible settlement which would obviate the need for an opportunity to appeal from the Order of Dismissal.

4/ Motions to Dismiss the Colt Complaint were also filed by Sea-Land Service, Inc., AEL and USL.

No appeal from the Order of Dismissal was filed on or before the extended deadline of April 26, 1976 and none has been filed with the FMC as of this date. Under FMC Rules 10(m) and 13(g) (46 CFR 502.153 and 227) the Order of Dismissal entered in Docket 75-19 became _sub silentio_ the decision of the Commission thirty days after the extended deadline for appeal and passed (i.e., May 26, 1976). Upon inquiry to the docket section of the FMC, Counsel for USL has been advised that Docket No. 75-19 is no longer listed as an open case.

In these circumstances, and without regard to whether a settlement was ever reached between Colt and Interconex in Docket 75-19[5], it is clear that further consideration of ICX's contingent claim for indemnification in Docket 75-24 would serve no further adjudicatory or regulatory purpose. The allegations made by Colt in Docket 75-19 and which ICX attempted to adopt by reference in Docket 75-24 remain unproven. There can be no finding that ICX is obligated to pay Colt reparations and, therefore, not even an arguable basis remains for ICX's contingent claim seeking indemnification for any award of reparations that might have been levied against ICX in Docket 75-19.

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[5] See USL's covering letter.

WHEREFORE, United States Lines, Inc. upon the facts recited above requests that Docket Number 75-24 be discontinued by an appropriate Order reflecting the termination of the complaint proceeding in Docket 75-19 upon which Interconex, Inc. plainly premised its contingent claims for indemnification.

Respectfully submitted,

Dated: August 6, 1976

Russell T. Weil

James P. Moore

Attorneys for
United States Lines, Inc.

KIRLIN, CAMPBELL & KEATING
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4911

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion have been served upon all parties of record to this proceeding by first class mail, postage prepaid, this 6th day of August, 1976.

James P. Moore

BEFORE THE

FEDERAL MARITIME COMMISSION

INTERCONEX, INC.,

Complainant

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,

Respondents

Docket No. 75-24

REPLY IN OPPOSITION TO INTERCONEX MOTION TO FILE AN OTHERWISE UNAUTHORIZED DOCUMENT

INTRODUCTION

Pursuant to Rule 5(n) of the FMC's Rules of Practice and Procedure (46 CFR 502.74) United States Lines, Inc. (USL) hereby replies to the July 22, 1976 Motion by Interconex, Inc. (ICX) whereby ICX seeks leave of the Commission to file a supplement to its previous appeal from the Administrative Law Judge's August 11 and August 15, 1975 Orders dismissing ICX's Complaint in the above-captioned matter. As detailed below, this ICX Motion should be dismissed as unwarranted, inaccurate and irrelevant to the ultimate disposition of ICX's appeal from the outstanding Order of Dismissal.

ICX's SUPPLEMENTAL SUBMISSION GOES BEYOND PROVIDING NOTICE OF THE COURT OF APPEALS DECISION IN THE *KRAFT* CASE.

ICX has chosen to tender a four-page Supplement to its earlier appeal to alert the Commission to the fact that the U.S. Circuit Court of Appeals for the District of Columbia has vacated the Commission's Order in *Kraft Foods v. Moore McCormack Lines, Inc.*, FMC Dkt. 73-44, 14 SRR 603 (1974), (with a remand of that matter to the Commission for a determination of the merits of Kraft's claim for freight overcharges.)[1/]

Contrary to statements contained in ICX's forwarding Motion, the supplemental materials attempt more than "the sole purpose of notifying the Commission that a recent decision of the Court of Appeals...has reversed a Commission decision relied upon by the Administrative Law Judge...".

In particular, ICX has exceeded the stated notification function by:

1. Again reciting ICX's position that USL "would be required to indemnify ICX for all or part of such payment" as ICX might be required to make to Colt Industries Operating Corp. in the separate complaint proceeding, Dkt. No. 75-19.[2/]

2. Asserting that each of the respondents, including USL, "relied heavily" upon the *Kraft* rule language and the Commission's decision in the *Kraft* case.

[1/] Appeal decided July 13, 1976 *sub nomine*, *Kraft Foods v. F.M.C.*, C.A. No. 75-1004 (D.C. Cir.)

[2/] *Colt Industries Operating Corp. v. Interconex, Inc., et al.*, F.M.C. Docket 75-19, dismissed by Order dated Sept. 5, 1975, from which no appeal was taken.

3. Now asserting that in the Dkt. 75-24 Order of Dismissal the Administrative Law Judge "placed hea / reliance upon the Kraft rule;" and,

4. Now arguing that "the Court of Appeals' decision in the Kraft case undermines the only possible basis for upholding Judge Harris's Order."

USL does not object to providing the Commission with notice of the Court of Appeals' Opinion in the Kraft case but does strenuously object to these ICX attempts to reiterate and reargue its appeal based upon that recent event, and to assert that the reversal of the Kraft case is dispositive of the Administrative Law Judge's Order of Dismissal.

ICX's new and unwarranted emphasis upon the Kraft case must be compared with ICX's earlier pleadings wherein it stated:

> "ICX takes no position, in this motion, concerning the USL argument that the Kraft Rule precludes its claim for reparation based upon alleged errors in description, weight and/or measurement; because ICX failed to present such claims to USL before the cargo involved left the custody of USL."3/

The Kraft case was not the sole or even the primary authority relied upon by USL in making its Motion to Dismiss ICX's purported complaint for contingent indemnification. ICX's attempt to now attach overriding importance to the Kraft case concept as "the only possible basis for upholding the Order of

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3/ Reply of Interconex, Inc. to Motion to Dismiss by United States Lines, Inc., filed August 6, 1975, at page 6.

Dismissal" incorrectly ignores the other arguments and authorities advanced by USL (and the other respondents) including:

1. The undisputed fact that ICX's complaint failed to comply with Rule 8(b) of the Commission's Rules of Practice and Procedure.[4]

2. The undisputable fact that ICX's complaint still has not been verified in accordance with Rule 8(b).[5]

3. The undisputed fact that the FMC's Rules of Practice and Procedure do not permit the assertion of a contingent cross-claim by way of a separate complaint.[6]

4. The argument that ICX's complaint for contingent indemnification does not state a cause of action against USL.[7]

5. The argument that any claims for reparations are subject to the two-year limitations period in Section 22 of the Act and Rule 5(c) (46 CFR 502.63).[8]

4/ This deficiency was noted in USL's Motion to Dismiss filed July 22, 1975 at pp. 2 & 3, and admitted in ICX's August 6, 1975 Reply thereto at p. 3.

5/ ICX's Continuing failure to verify its complaint in accordance with Rule 8(b) is described in USL's Sept. 12, 1975 Reply to ICX Appeal from Order Dismissing Complaint at pp. 5 & 6.

6/ Asserted at pp. 3 & 4 of USL Motion to Dismiss and admitted at p. 3 of ICX's Reply thereto, and at p. 4 of ICX's August 25, 1975 Appeal from the Order of Dismissal; also discussed at pp. 6-9 of USL's Sept. 12, 1975 Reply to ICX Appeal from Order Dismissing Complaint.

7/ Asserted at pp. 4, 5 & 6 of USL 's Motion to Dismiss and supported by ICX's admission that "...ICX has no reason to make any unconditional claim against the underlying carriers unless it is held liable to Colt...." (ICX Appeal at p. 6); also discussed at pp. 9 & 10 of USL's Reply to ICX's Appeal.

8/ Asserted at pp. 9 & 10 of USL's Motion to Dismiss, to which ICX responded that "ICX takes no position, in this motion, on the USL argument that the two-year Statute of Limitations in Section 22 of the Shipping Act precludes reparation with respect to all shipments which occurred more than two years before the filing of its Complaint." (ICX Reply at pp. 6 & 7); see also USL Reply to ICX Appeal at pp.13-15.

In these circumstances, it is clear that the procedural and substantive sufficiency of ICX's claim for contingent indemnification was successfully challenged before the Presiding Officer on grounds and authorities other than the Commission's previous ruling in the Kraft case and that the Circuit Court's action in the Kraft case is irrelevant to the ultimate disposition of ICX's Appeal from the Order of Dismissal.

ICX's REQUEST FOR SUPPLEMENTARY BRIEFING AND ORAL ARGUMENT HAVE BEEN SUPERSEDED BY OTHER EVENTS WHICH HAVE DISPOSED OF ICX's CLAIM FOR CONTINGENT INDEMNIFICATION.

ICX's petition focuses upon only one event which has occurred since the filing of its appeal from the Order of Dismissal in Docket 75-24. As detailed in USL's Motion filed this date, another and more noteworthy and dispositive event with respect to this proceeding is the fact that the underlying complaint proceeding in Dkt. No. 75-19 has been terminated[9] with the result that ICX's interdependent claim for indemnification in Dkt. No. 75-24 has been mooted. The importance of the termination of the basic controversy upon which ICX based its claim for contingent indemnification cannot be overlooked in ruling upon ICX's Motion to supplement its appeal and obtain oral argument in this case.

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[9] The time for appeal from the Order of Dismissal in the underlying Dkt. No. 75-19 expired on April 26, 1976 with the result that there are no outstanding claims by Colt and/or the Republic of Korea against ICX or USL in Dkt. 75-19 for ICX to use as a basis for continued assertion of its claims for contingent indemnification. See also USL's letter of transmittal for USL Motion filed today.

As stated by ICX in its appeal from the Order of Dismissal in Docket 75-24:

> "In any event, ICX has no reason to make any *unconditional* claim against the underlying carriers unless it is held liable to Colt..." (ICX Appeal from an Order of Administrative Law Judge Dismissing the Complaint, filed August 25, 1975 at p. 6).

WHEREFORE, the Commission should issue an order wherein it takes appropriate judicial notice of the Court of Appeals' Decision in Kraft Foods, Inc. v. F.M.C. (D.C. Cir., July 13, 1976), denies ICX's Motion for leave to file supplemental materials, and discontinues further consideration of Dkt. 75-24 because of the termination of the underlying Dkt. No. 75-19.

Respectfully submitted,

Dated: August 6, 1976

Russell T. Weil

James P. Moore

Attorneys for
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Washington, D.C. 20036

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served by first class mail, postage prepaid, upon all parties to this proceeding this 6th day of August, 1976.

James P. Moore

BEFORE THE

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

INTERCONEX, INC.,
mplainant,

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents.

Docket No. 75-24

REPLY OF INTERCONEX, INC. TO U.S. LINES, INC. MOTION TO DISMISS THE INTERCONEX APPEAL FROM THE ORDER OF DISMISSAL

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August 23, 1976

BEFORE THE

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

INTERCONEX, INC.,
Complainant,

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.,
Respondents.

Docket No. 75-24

REPLY OF INTERCONEX, INC. TO U.S. LINES, INC. MOTION TO DISMISS THE INTERCONEX APPEAL FROM THE ORDER OF DISMISSAL

Pursuant to Rule 7(c) of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.74(a)), Interconex, Inc. hereby replies to the motion of U.S. Lines to dismiss its appeal in the above-captioned proceeding. In support of its reply, Interconex states as follows:

1. BACKGROUND

Colt Industries initiated a proceeding (Colt v. Interconex, et al., FMC Docket 75-19) by filing a complaint on June 5, 1975 on behalf of the Republic of Korea and itself. Interconex, Sea-Land Service, Inc., American Export Lines, Inc., and U.S. Lines were named as Respondents. Colt alleged that Interconex, acting as a nonvessel operating common carrier by water, prepared approximately 379 ocean bills of lading during the period January 28, 1972 to February 5, 1975 in which the cubic measurements and/or weights of Colt cargo shipped from U.S. ports to Korea were overstated. It also alleged that by reason of such overstated measurements and/or weights, Interconex and the underlying carriers mentioned in its complaint received compensation in excess of that provided for in their applicable tariffs.

At the time of that complaint, Interconex had no way of knowing whether Colt's allegations were true or not, as Interconex had relied upon Colt's declarations of the true measurements and/or weights of the cargo in preparing its bills of lading and the underlying carriers' bills of lading. Interconex believed (and still firmly believes) that if it were under an obligation to refund overcharges to Colt as a result of any overstated measurements and/or weights, then the underlying carriers were under a similar obligation to refund corresponding overcharges to Interconex, since the same measurements and/or weights were listed on both sets of bills of lading.

Interconex could not protect its interests by merely awaiting the outcome of the Colt litigation and then proceeding against the underlying carriers if it were determined that any or all of the Colt claims of overcharge turned out to be correct; the statute of limitations was running against Interconex. In fact, it appeared that the two-year statute of limitations established in Section 22 of the Shipping Act of 1916 probably would run out before exhaustion of the proceedings initiated by the Colt complaint.

In the federal courts and most of the state courts, third party practice rules would have set out specific procedures enabling Interconex to argue against the Colt claim, while protecting its right to indemnification from the underlying carriers. Since the Commission has not established specific third party procedural rules, Interconex was faced with the problem of protecting its rights under the established procedural rules.

Interconex filed its complaint in Interconex v. Sea-Land Service et al., FMC Docket No. 75-24, as a means of protecting its right to indemnification from the underlying carriers, while defending against the Colt claim in Docket 75-19. By that complaint, Interconex intended to notify (and as we will argue later in this Reply, succeeded in notifying) the underlying carriers of its possible indemnification claim, thereby tolling the statute of limitations. Interconex based its allegations of overcharge upon the Colt claim of overstated measurements and/or weights (incorporating the Colt complaint in Docket 75-19 by reference) instead of making an unconditional allegation of overcharge for two reasons:

a. At the time Interconex's complaint was filed, it had not had an opportunity to review Colt's documentation of its overcharge claim. Since Interconex only had knowledge of the weights and measurements declared by Colt, it had no basis, at that time, for alleging that the actual weights and/or measurements of the cargo were less than the weights and measurements declared by Colt. Interconex was not about to swear to the truth of facts that it had no way of knowing to be true.

b. Without explicit authorization for inconsistent pleading, such as is provided for in specific third party practices procedural rules, Interconex determined that it should not plead the existence of overcharges in Docket 75-19, while denying the existence of overcharges in Docket 75-24.

After reviewing Colt's records, Interconex became convinced that some of the measurements and/or weights had been overstated. Moreover, its review of the Commission decisions indicated that Colt would have a strong chance of recovering such overcharges even if Interconex were able to prove its contention that Colt, itself, supplied the overstated weights and/or measurements.[1] The best Interconex defense against the Colt claim appeared to be a tariff rule requiring that all claims based upon mismeasurement had to be submitted to the carrier before the cargo left its position (the so-called Kraft rule). Interconex was aware, however, that the Commission decision upholding the Kraft rule — Kraft Foods v. Moore-McCormack Lines, Inc., 14 SRR 603 (1974) — was on appeal to the Court of Appeals, and believed that the Court probably would reverse the Commission decision.

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[1] See, for example, Johnson and Johnson v. Prudential Grace, 14 SRR 187, 190-91 (Init. Dec. 1973), aff'd 14 SRR 1465 (1975) and cases cited therein; Uniroyal International v. Farrell Lines, 13 SRR 881, 885 (1973); Johnson and Johnson International v. Venezuelan Lines, 13 SRR 305, 310-11 (Init. Dec. 1972), aff'd 13 SRR 536 (1973).

In view of those circumstances and the prospect of enormous legal expenses inherent in litigating the dispute, Interconex determined to settle the Colt complaint. Colt, the Republic of Korea, and Interconex reached agreement on a negotiated settlement in April of 1976. Accordingly, the parties did not appeal the dismissal of Colt's claim and Interconex's counterclaim in Docket No. 75-19, and forwarded a copy of that settlement agreement to the Commission.[2/]

The underlying carriers were invited to become party to an overall settlement in which they would settle Interconex's claims against them, as well as Interconex and Colt settling their claims against each other. Interconex and the underlying carriers, however, were not able to reach agreement.

2. THE U.S. LINES MOTION

In essence, U.S. Lines contends that events subsequent to Interconex's appeal to the dismissal of this complaint (dated August 25, 1975), namely the termination of proceedings

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[2/] There has been some confusion over the Interconex request for confidential treatment of the settlement agreement. Interconex desires confidential treatment of the terms of the settlement agreement, since it involves confidential relationships between Interconex and its shippers; it does not request that the existence of the settlement agreement be withheld from the public.

in Docket 75-19, have the effect of mooting its appeal. For the reasons described below, Interconex contends that its appeal is alive and well.

3. THE RIGHT TO APPEAL

Interconex is granted the right to appeal under Commission Rule 10(m) (46 CFR §502.153). That right is not withdrawn when an opposing party contends that subsequent events have weakened the appeal. The Commission has the power to decide that the subsequent events form a basis for affirming the dismissal, or it can affirm the dismissal for any other reason deemed suitable to it. (Interconex, of course, maintains that no events occurring before or after the date of its appeal justify affirmance of the Judge's decision and that his order of dismissal should be reversed.) The Commission cannot comply with principles of due process of law while dismissing the appeal as if it were never filed.

4. THE ADEQUACY OF THE NOTICE PROVIDED BY THE INTERCONEX COMPLAINT

There should be no doubt in anyone's mind as to the nature of the Interconex claim against U.S. Lines — Interconex has consistently claimed that if it is obliged to refund overcharges to its shipper, Colt, then U.S. Lines is obligated to refund corresponding overcharges to its shipper, Interconex.

When Interconex became convinced that certain measurements and/or weights of Colt cargo had been overstated and that it had a legal obligation to refund certain overcharges to

Colt (even though such overcharges resulted from Colt's own misdeclarations of measurements and/or weights), it did so by way of a settlement agreement. Interconex does not contend that the settlement agreement is absolute proof of the fact that measurements and/or weights were overstated on certain shipments. It is completely willing to bear its burden of proving that measurements and/or weights were overstated on some Interconex bills of lading, that measurements and/or weights were overstated on corresponding U.S. Lines' bills of lading, and that U.S. Lines is under a legal obligation to indemnify Interconex for all or a part of that refund. The fact that Interconex was willing to settle its differences with Colt without extensive and wasteful litigation, however, must not be twisted into a basis for ruling that it thereby weakened its rights to recovery from U.S. Lines.

U.S. Lines' claim that the Interconex complaint somehow became deficient upon the settlement in Docket 75-19 should be measured against the standards for determining the sufficiency of complaints under modern administration and judicial concepts. As stated by Professor Davis, probably the foremost authority on administrative law:

> "The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. In the judicial system the long-term movement has been from the common-law system of pleading to formulate issues, to the early code ideal of stating all material facts, to the view now prevailing in the federal courts that fair notice is the objective. Of pleading

> in the courts, Profession (sic) Moore says in his treatise: 'The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved.... A generalized summary of the case that affords fair notice is all that can be expected.' " Davis, Administrative Law Treatise, at 523 (1958).

As noted in Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841-42 (D.C. Cir. 1950):

> "The whole thrust of modern pleading is towards fulfillment of a notice giving function and away from the rigid formalization of the common law."

Surely, the notice given U.S. Lines of the nature of the Interconex claim by way of its complaint and other pleadings in this proceeding has been sufficient to warn it that Interconex demands that it return overcharges resulting from the overstated measurements and/or weights in question.

5. THE PROPER REMEDY FOR DEFECTIVE COMPLAINTS IS THEIR AMENDMENT

Even if the Commission were to accept all of the arguments contained in the U.S. Lines motion and reject all of its preceding counterarguments, the proper remedy for a defective pleading in these circumstances is its amendment, not is dismissal. Commission Rule 5(j) provides that: "The Presiding Officer may direct a party to state his case more fully and in more detail by way of amendment." This rule corresponds with Rule 15(a) of the Federal Rules of Civil Procedure providing that, after any responsive pleadings are filed or a party has once amended his pleadings, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[3/]

The courts have taken seriously the principle that an amendment to a defective pleading, not its dismissal, is the proper remedy. For example, in Foman v. Davis, 371 U.S. 178, 181-82 (1962), the Supreme Court forcefully affirmed the concept that leave to amend pleadings should be freely given, and just as forcefully rejected the concept that decisions on the merits may be avoided on the basis of technical pleading rules. The First Circuit ruled accordingly in Ballou v. General Electric Co., 393 F.2d 398 (1st Cir. 1968): "In any event, it would have been necessary to give plaintiffs an opportunity to amend if this were merely a matter of deficient pleadings." Id. at 399. The Commission should be no less anxious to require just and fair determination of disputes.

As far as we can determine, no previous party to a dispute before this Commission has been caught in the middle of a dispute between a shipper, on the one hand, and underlying carriers, on the other hand. Interconex was faced with the necessity of pleading completely different theories of

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[3/] The differences between the two rules are not especially significant. First, the Commission's Rule explicitly allows the Presiding Officer to take the initiative in having pleadings amended, while the Federal Rules reserve the initiative to the litigants. Second, the Federal Rules explicitly require the Judge to grant leave to amend when justice so requires. The obligation of FMC Administrative Law Judges to conduct proceedings justly, however, is no less than that imposed upon federal judges.

law and facts to protect its interests, and utilized existing Commission procedures to proceed in the manner which appeared to be most appropriate. It would be extremely harsh to dismiss the Interconex complaint on the basis that it strayed from the precisely proper procedural footpath, when there was none to follow. Instead, the proper remedy for any defect in the complaint resulting from events subsequent to the appeal (and we reiterate our contention that there is no defect) is reversal of the order dismissing the complaint with instructions that the Presiding Officer exercise his power to require that the complaint be amended to cure any such defects. Interconex hereby expresses its willingness to comply with such a directive. In the alternative, if the Commission finds that complaint to be defective, Interconex requests the right to amend its pleadings to conform to the facts discovered subsequent to the filing of its appeal to the dismissal of its complaint.

For the reasons stated herein, Interconex respectfully urges the Commission to deny U.S. Lines' motion to dismiss its appeal.

Respectfully submitted,

Robert L. McGeorge

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Attorneys for Interconex, Inc.

August 23, 1976

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Interconex, Inc. to U.S. Lines, Inc. Motion to Dismiss Interconex's Appeal from the Order of Dismissal was served upon each of the parties of record by first class mail, postage prepaid, this 23rd day of August, 1976.

Robert L. McGeorge

Robert L. McGeorge

(SERVED)
(APRIL 1, 1977)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.

ORDER OF DISMISSAL

On June 5, 1975, Colt Industries (Colt) on its own behalf and as an agent for the Government of the Republic of Korea filed a complaint in Docket No. 75-19 against Interconex, Inc. (ICX), and Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL). In its complaint, Colt alleged that ICX, acting as a non-vessel operating common carrier by water (NVOCC), prepared 379 ocean bills of lading during the period of July 28, 1972 to February 5, 1975 on cargoes to be transported on vessels owned by Sea-Land, USL and AEL in which the cubic measurements and/or weights of Colt cargo shipped from United States ports to Korea were overstated. It was also alleged that, by reason of such overstated measurements and/or weights, ICX and the underlying carriers received compensation in excess of that provided for in their applicable tariffs, contrary to section 18(b)(3) of the Shipping

Act, 1916 (Act). Colt sought reparation for Respondents in the amount of $500,000. ICX subsequently (July 11, 1975) filed a counterclaim for some $1,100.00 against Colt in Docket No. 75-19.

In response to motions filed by various parties, the Presiding Administrative Law Judge by Order served September 5, 1975, dismissed Colt's claim and ICX's counterclaim. By virtue of a negotiated settlement reached by Colt, the Republic of Korea and ICX, the parties did not appeal the Administrative Law Judge's dismissal.[1]

On June 24, 1975, ICX filed the complaint in this proceeding, *i.e.*, Docket No. 75-24. In its pleadings ICX advised that it instituted this proceeding primarily to toll the two-year statute of limitation with respect to any claims that it may have against Sea-Land, AEL, and USL as a result of Colt's claim against it in Docket No. 75-19. Further, ICX stated that it considered its complaint in this proceeding to be "in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure", and requested that its complaint be consolidated with the proceedings in Docket No. 75-19.

Because of the similarity of the causes of action, ICX adopted Colt's complaint in Docket No. 75-19 and incorporated it by reference in the complaint filed in this proceeding. ICX alleged that "on information and belief", Respondents "will or may" be required to "indemnify" ICX and that they "are or may be liable" to ICX for "all or part" of any reparations ICX may be required to pay as a consequence of the complaint in Docket No. 75-19. ICX submitted that if Colt, a shipper, prevails in its claim against ICX, as a carrier, the same set of facts and case law will entitle ICX, as a shipper, to recover from the respondent carriers.

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[1] The underlying carriers (USL, AEL, and Sea-Land) were invited to become party to an overall settlement in which they would settle ICX's claims against them in Docket No. 75-24, discussed *infra*, as well as ICX and Colt settling their claims against each other. ICX and the underlying carriers, however, were unable to reach agreement.

Respondents each have moved for the dismissal of ICX's complaint on the ground that it is procedurally and substantively deficient. ICX responded to each of the motions.

On August 11, 1975, Administrative Law Judge William Beasley Harris granted Respondents' motions to dismiss the proceeding in Docket No. 75-24. In so doing, he observed that ICX had filed no replies to Respondents' dismissal motions. When ICX explained to the Presiding Officer the clerical error which resulted in him not receiving copies of ICX's replies to Respondents' motions, the Presiding Officer entered an "Order Upon *Sua Sponte* Reconsideration of Order served August 11, 1975," wherein he took into account ICX's replies and reaffirmed his Order of August 11, 1975.[2]

ICX has now filed an appeal from the order of dismissal to which Respondents have replied. USL has also filed a second motion to dismiss ICX's appeal arguing that it is moot because Docket No. 75-19 has since been terminated.

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[2] On the day the Presiding Officer issued his *sua sponte* Order, ICX moved for reconsideration and oral argument with respect to the Order of August 11, 1975. The Presiding Officer did not address ICX's motion. However, since ICX, in its reconsideration request, made the same arguments as were in its reply to Respondents' motions to dismiss, we consider the *sua sponte* reconsideration order to be an adequate response to the arguments advanced by ICX on reconsideration.

USL's dismissal request is premised on the theory that because the Administrative Law Judge's dismissal of Docket No. 72-19 was not appealed, and subsequently became the decision of the Commission, and because Docket No. 75-24 is premised upon Docket No. 75-19, no regulatory purpose would be served by allowing Docket No. 75-24 to continue. USL believes that in view of the fact that ICX has incorporated by reference Colt's allegations in Docket No. 75-19, which allegations will now never be proven, ICX's appeal has become moot.

ICX, in reply, argues that the dismissal of Colt's complaint should have no bearing on its right to appeal. It would violate due process, contends ICX, for the Commission to treat its appeal as though it has never been filed; particularly because its complaint constitutes an independent cause of action. The proper approach, concludes ICX, is not to dismiss its complaint but, rather, to allow ICX to amend its complaint making clearer its independence from Colt's complaint. We disagree. We view ICX's complaint as a contingent claim based upon a set of circumstances which now cannot come about.

The complaint of ICX in this proceeding being "in the nature of a cross-claim" did not constitute a wholly independent cause of action but rather relied for its vitality upon the catalytic effect of a finding that ICX was liable to Colt Industries for assessing improper charges under the complaint filed in Docket No. 75-19. In the event of such a finding, then the claim of ICX, in theory at least, would come to life and any liability suffered by ICX would then *ipso facto* form the basis of ICX's complaint against the ocean carriers.

ICX itself in its appeal recognized the contingency of its claim when it advised that:

> . . . ICX has no reason to make any *unconditional* claim against the underlying carriers unless it is held liable to Colt . . . [emphasis original];

and, that:

> Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot--in which case the ICX complaint can be dismissed or withdrawn.

The contingency -- *i.e.*, a finding of ICX's liability in Docket No. 75-19 -- failed, however when the claim of Colt against ICX was dismissed by the Presiding Officer and became the decision of the Commission. This dismissal of the underlying Colt complaint destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding. Therefore, ICX has no claim as to which, under any set of circumstances, as framed, it would prevail. (*Investigation of General Rate Increase in the Domestic Guam Trade*, 7 S.R.R. 167 (1969)). In short, our determination here is a denial of ICX's appeal from the Presiding Officer's Order of Dismissal. We do so having thoroughly reviewed the ICX appeal. We see in our denial no deprivation of due process.

Our disposition of the overriding issue remaining in this proceeding makes unnecessary any ruling by us on USL's motion to dismiss ICX's appeal.

THEREFORE, IT IS ORDERED, That appeal of Interconex, Inc. from the Presiding Officer's Order of Dismissal is denied;

FURTHER, IT IS ORDERED, That the complaint of Interconex, Inc. is, dismissed with prejudice.

By the Commission.

Joseph C. Polking

Joseph C. Polking
Acting Secretary

(SEAL)